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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

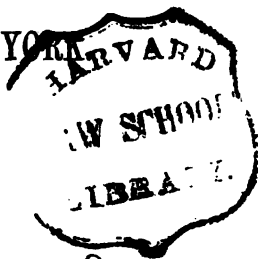


# SURROGATE'S COURT

OF THE

COUNTY OF NEW-YORK

BY



ALEXANDER W. BRADFORD, LL D.,

SURROGATE.

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# CASES

## REPORTED IN THIS VOLUME.

	PAGE.
Applegate vs. Cameron . . . . .	119
Barstow vs. Goodwin . . . . .	418
Beers, <i>Ex Parte</i> . . . . .	168
Bernes vs. Weisser . . . . .	212
Bloodgood vs. Bruen . . . . .	8
Bloomer vs. Bloomer . . . . .	389
Bowen vs. Bowen . . . . .	386
Bruen, Bloodgood vs. . . . .	8
Brown, <i>Ex Parte</i> . . . . .	22
Brown vs. The Public Administrator . . . . .	108
Brown vs. Lynch . . . . .	214
Bulkley vs. Redmond . . . . .	281
Burwell vs. Shaw . . . . .	322
Cameron, Applegate vs. . . . .	119
Campbell vs. Renwick . . . . .	80
Campbell vs. Logan . . . . .	90
Case, Peebles vs. . . . .	226
Churchill vs. Prescott . . . . .	304
Clayton vs. Wardell . . . . .	1
Cochrane, Hutchings vs. . . . .	295
Coles, Harring vs. . . . .	349
Conklin vs. Moore . . . . .	179
Cox, Woodruff vs. . . . .	153
“ “ “ . . . . .	223
Cullen, Waters vs. . . . .	354

	PAGE.
Dominick <i>vs.</i> Moore . . . . .	201
Doughty, Stilwell <i>vs.</i> . . . . .	811
Dudley <i>vs.</i> Griswold . . . . .	24
Dunning, Montgomery <i>vs.</i> . . . . .	220
Dunscomb, St. Jurgo <i>vs.</i> . . . . .	105
Eitel <i>vs.</i> Walter . . . . .	287
Ely, Redmond <i>vs.</i> . . . . .	175
Ferris, Holland <i>vs.</i> . . . . .	334
Fitzgerald, Weir <i>vs.</i> . . . . .	42
Fortune, Treat <i>vs.</i> . . . . .	116
Ginochio, Marre <i>vs.</i> . . . . .	165
Glover <i>vs.</i> Holley . . . . .	291
Goodall <i>vs.</i> McLean . . . . .	306
Goodwin, Barstow <i>vs.</i> . . . . .	418
Gottsberger <i>vs.</i> Smith . . . . .	86
Griswold, Dudley <i>vs.</i> . . . . .	24
Hall <i>vs.</i> McLaughlin . . . . .	107
Harring <i>vs.</i> Coles . . . . .	349
Hepburn <i>vs.</i> Hepburn . . . . .	74
Hetterick, Wilson <i>vs.</i> . . . . .	427
Holland <i>vs.</i> Ferris . . . . .	334
Holley, Glover <i>vs.</i> . . . . .	291
Hornby, <i>Ex Parte</i> . . . . .	420
Horton <i>vs.</i> Horton . . . . .	200
Hutchings <i>vs.</i> Cochrane . . . . .	295
Jones, Mason <i>vs.</i> . . . . .	181
" " " . . . . .	825
Judah, Richardson <i>vs.</i> . . . . .	157
Kapp <i>vs.</i> The Public Administrator . . . . .	258
Kenney <i>vs.</i> " " . . . . .	819
Kerr, McGuire <i>vs.</i> . . . . .	244

# CASES.

v

	PAGE.
Lindsay, <i>Ex Parte</i> . . . . .	304
Logan, Campbell <i>vs.</i> . . . .	90
Lynch, Brown <i>vs.</i> . . . .	214
Mack's Assignees, Sears <i>vs.</i> . . . .	394
Marre <i>vs.</i> Ginochio . . . . .	165
Mason <i>vs.</i> Jones . . . . .	161
" " " . . . . .	325
Maverick <i>vs.</i> Reynolds . . . . .	360
McCormick, <i>Ex Parte</i> . . . . .	169
McDonnell, <i>Ex Parte</i> . . . . .	32
McGuire <i>vs.</i> Kerr . . . . .	244
McLaughlin, Hall <i>vs.</i> . . . .	107
McLean, Goodall <i>vs.</i> . . . .	306
McSorley <i>vs.</i> McSorley . . . . .	188
Meehan <i>vs.</i> Rourke . . . . .	385
Merchant <i>vs.</i> Merchant . . . . .	432
Montgomery <i>vs.</i> Dunning . . . . .	220
Moore, Conklin <i>vs.</i> . . . . .	179
Moore, Dominick <i>vs.</i> . . . . .	201
Moore <i>vs.</i> Moore . . . . .	261
Mowry <i>vs.</i> Silber . . . . .	183
Nelson <i>vs.</i> The Public Administrator . . . . .	210
Parkinson <i>vs.</i> Parkinson . . . . .	77
Peebles <i>vs.</i> Case . . . . .	226
Prescott, Churchill <i>vs.</i> . . . .	304
Quimby, Thompson <i>v.</i> . . . .	449
Redmond <i>vs.</i> Ely . . . . .	175
Redmond, Bulkley <i>vs.</i> . . . . .	281
Renwick, Campbell <i>vs.</i> . . . . .	80
Reynolds, Maverick <i>vs.</i> . . . . .	360
Richardson <i>vs.</i> Judah . . . . .	157

	PAGE.
Romaine, Skidmore vs. . . . .	122
Rourke, Mahan vs. . . . .	385
Sears vs. Mack's Assignees . . . . .	894
Shaw, Burwell vs. . . . .	822
Silber, Mowry vs. . . . .	183
Skidmore vs. Romaine . . . . .	122
Smith, Gottsberger vs. . . . .	86
Stilwell vs. Doughty . . . . .	811
Stires vs. Van Rensselaer . . . . .	172
Strain, The Roman Catholic Orphan Asylum vs. . . . .	84
St. Jurgo vs. Dunscomb . . . . .	105
The Roman Catholic Orphan Asylum vs. Strain . . . . .	84
The Public Administrator, Brown vs. . . . .	108
"    "    "    Kapp vs. . . . .	253
"    "    "    Kenney vs. . . . .	819
"    "    "    Nelson vs. . . . .	210
"    "    "    Turpin vs. . . . .	424
Thompson vs. Quimby . . . . .	449
Treat vs. Fortune . . . . .	116
Turpin vs. The Public Administrator . . . . .	424
Van Rensselaer, Stires vs. . . . .	172
Walter, Eitel vs. . . . .	287
Wardell, Clayton vs. . . . .	1
Waters vs. Cullen . . . . .	854
Weir vs. Fitzgerald . . . . .	42
Weisser, Bernes vs. . . . .	212
Woodruff vs. Cox . . . . .	153
"    "    "    . . . . .	223
Wilson vs. Hetterick . . . . .	427

# **CASES IN SURROGATE'S COURT.**



REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
SURROGATE'S COURT  
OF THE  
COUNTY OF NEW-YORK.

---

BEFORE ALEXANDER W. BRADFORD, SURROGATE.

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CLAYTON *vs.* WARDELL.

*In the matter of the Estate of GEORGE G. MESSEERVE,  
deceased.*

*In the matter of the Estate of GEORGE SUTTON, deceased.*

IN a question of legitimacy, it was adjudged by the Surrogate, that C. A. was "not the lawful issue" of G. M., and "was not entitled to any interest whatever in the estate of the said G. M., deceased." On appeal, the Supreme Court decreed, "that the said C. A. is the lawful issue of the said G. M., deceased, and that the said decree of the said Surrogate, be, and the same is hereby, in all things reversed;" and "that the said Surrogate resume and proceed with the accounting in reference to the estate of the said G. M., deceased." This decree was affirmed by the Court of Appeals. On the resumption of the accounting before the Surrogate, an application by the executors of G. M., for leave to furnish additional proofs on the question of legitimacy, was denied.

By the course of procedure prevailing in courts proceeding according to the practice and rules of the civil law, the effect of an appeal is to transfer the entire case, not merely for *review*, but also, if deemed proper, for

## CLAYTON vs. WARDELL.

*trial*; and it is competent for the appellate court to hear further testimony on the old, or on new allegations.

The appellate court may not only affirm or reverse the judgment below, but may modify it, or make an entirely new decree in accordance with its own views of justice; and in such case its adjudication is conclusive, and the Surrogate has no authority to hear further proofs on the point so determined.

An executor duly served with the original citation and neglecting to appear, though not made party to the appeal, has no right, on the cause being remitted, to litigate the question contested by his co-executors before the Surrogate, and determined by the court above on appeal.

Executors having made partial distribution, after notice of a claim on the establishment of which the estate becomes insufficient to pay all the debts of the deceased, must nevertheless respond to the creditors to the full extent of all the assets.

If, on taking the inventory, the property directed by statute to be set apart for minor children, was not so apportioned, the error may be corrected on the accounting.

The advertisement for claims protects the executor, in case of distribution after the advertisement has expired.

HARRIS WILSON, *for Petitioner.*

CHARLES W. SANDFORD, *for Executors of Messerve.*

CHARLES O'CONOR,

J. J. LATTING, *for Executors of Sutton.*

J. T. MILLA,

GEO. P. NELSON,

E. M. WILLETT,

BELL & COE,

RICHARD BUSTEED, *for Creditors.*

**THE SURROGATE.** George G. Messerve, deceased, bequeathed to his executors ten thousand dollars in trust, to invest, and pay the interest to his son George during life, and on his death "to pay and distribute the said ten thousand dollars to and among the lawful issue of his said son George."

George Sutton, Charles C. Dobbs, and Nicholas Dean, were named executors; they all qualified, but Sutton took the principal charge of the estate.

Catharine Ann Messerve, by her next friend, on the 17th of April, 1839, filed her petition before the Surrogate, wherein, after setting out the will of the testator, Messerve, and the decease of his son George, she claimed to be the only child and lawful issue of George, by his marriage with

CLAYTON vs. WARDELL

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Sarah Maria Youngs, and prayed for an account and payment of the legacy of ten thousand dollars. A citation was issued on this petition, and on its return the parties appeared, but after several adjournments no further proceedings appear to have been had. On the 24th Dec., 1841, the matter was revived, and an order was made requiring the executors to account on the 2d of February then next. This order was personally served on all the executors. There is nothing to shew that Mr. Dobbs, one of the executors, ever appeared in person, on the return of this order, or subsequently. I have carefully examined the original minutes of the proceedings; and although witnesses are described as "produced, sworn and examined on the part of the executors," and "the counsel for the executors" is spoken of, yet in the decree, which was drafted by Mr. Sandford, that gentleman is described as counsel for Sutton and Dean, "surviving executors." It thus seems that, from some cause or other, perhaps from the non-appearance of the executor Dobbs on the return of the citation, the idea arose that he was deceased. That Mr. Sandford only appeared for the other executors, Sutton and Dean, is evidenced by the decree which he himself drafted.

Sutton and Dean, by their counsel, appear to have denied the allegation of the petitioner's interest, contending that she was not the lawful issue of George Messerve, deceased. Upon this point testimony was taken at various intervals from February 11 to July 12; some six witnesses having been examined on the part of the petitioner, and fourteen on the part of the executors—all on the single subject of the alleged marriage and the legitimacy of the petitioner. On the 15th December, 1843, the Surrogate made a decree, wherein, after reciting the proceedings had, service of the citation upon Sutton and Dean, "surviving executors," their appearance by counsel, and denial that the petitioner was "the lawful issue of the said George Messerve, deceased," and the hearing of the proofs of the respective parties, it was "ordered, adjudged and

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CLAYTON vs. WARDELL.

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decreed, that the said Catherine Ann Messerve is not the lawful issue of the said George Messerve, deceased, and is not entitled to any interest whatsoever in the estate of the said George G. Messerve, deceased ;" and it was further ordered that "the said petition be dismissed." The petitioner appealed from this order to the Chancellor, and under the new Constitution the appeal came under the cognizance of the Supreme Court. June 19, 1848, on the petition of Edward Clayton, who had intermarried with Catharine Ann Messerve, and the consent of Mr. Sandford, who appeared as counsel for Nicholas Dean, the executor of Messerve, and for Thomas Wardell and William E. Dodge, executors of the will of George Sutton, who had died pending the appeal, it was ordered by the Supreme Court that the appeal and the proceedings therein should stand revived, and be conducted in the name of Clayton and wife against Dean, executor of Messerve, and Wardell and Dodge, executors of Sutton. The appeal was thereafter heard ; and, January 29, 1849, it was adjudged and decreed by the Supreme Court "that the said Catharine Ann is the lawful issue of the said George Messerve, deceased, and that the said decree of the said Surrogate be, and the same is hereby, in all things reversed," and "that the said Surrogate resume and proceed with the accounting in reference to the estate of the said George G. Messerve, deceased, by the surviving executor of said last will and testament of the said George G. Messerve, and by the said respondents, Thomas Wardell and William E. Dodge, executors of George Sutton, deceased, late one of the executors of the last will and testament of George G. Messerve, deceased." This decree was affirmed by the Court of Appeals. On the return of the case to the Surrogate's Court, it appearing that Dobbs, one of the executors of Messerve, was still living, he was brought in by citation, and the accounting was resumed, as directed by the decree of the Supreme Court. The executors of Sutton being desirous of having the accounting, so far as it affected the

## CLAYTON vs. WARDELL.

estate of their testator, final, cited all the creditors, legatees, and next of kin of Sutton, to attend the final settlement of their accounts. In this way, both estates are now fully represented before me.

An application is now made by the surviving executors, Dean and Dobbs, to be permitted to furnish additional proof of the alleged previous marriage between the mother of Mrs. Clayton and Richard I. Schenck. Now, this was the very point urged before the Surrogate, to which all the testimony adduced by the executors of Messerve was directed, and upon which the question of the legitimacy of Mrs. Clayton depends. After a litigation of some ten years or more, had I the power to hear additional evidence upon an issue which has been determined by the highest appellate court, I do not think it would be in consonance with the salutary rules that govern applications of this kind, to allow the parties what would, in effect, be the benefit of a new trial. There is no allegation of surprise, or of newly discovered testimony; and the evidence sought to be introduced is merely cumulative to the precise and only point at issue in this matter from the very beginning.

It is insisted, however, that the executor, Dobbs, has a *right* to raise this question of the legitimacy of Mrs. Clayton anew. I think not. It is not sought to make him *personally* liable; he has no personal interest at stake, and is now cited in only for the purpose of proceeding formally in the accounting. If he did not appear on the return of the original citation, he is certainly precluded by his own laches; if he did appear, and was represented in common with the other executors by Mr. Sandford, the mistake of supposing him dead was the fault of his own counsel, who drew the decree. He cannot, therefore, now, in either case, set up that he was not made a party to the appeal which was taken from that decree. Besides, it is well settled that each executor has an entire authority and interest in regard to the estate of the testator. The estate

CLAYTON vs. WARDELL.

of Messerve is consequently bound by the result of the contest carried on by the executors, Sutton and Dean; and I cannot but think that it would be gross injustice to permit the identical question determined in that contest, by the Supreme Court and Court of Appeals, to be opened and litigated afresh by an executor who was so nearly a cypher in the administration of the estate, that for many years he was supposed to be dead. Nor, unless the executors have a *right* to produce further evidence on the original issue made with the petitioner, have I any authority to hear it. The issue has been tried and determined. There is no longer room for the exercise of judicial discretion. For by the course of procedure prevailing in courts proceeding according to the practice and rules of the civil law, the effect of the appeal is to transfer the entire case not merely for *review*, but also, if deemed proper, for *trial*; and it is competent for the appellate court to hear further testimony on the old or on new allegations. *In causâ appellationis a sententiâ definitivâ, licet tam appellanti, quam parti appellatæ, non allegata (coram iudice a quo) allegare, et non probata probare.* Oughton, *Tit.* 318, *pl.* 1; *Case vs. Towle*, 8 *Paige*, 479; 3 *Hagg*, 265, *note a*; *ibid*, 365. So, likewise, the appellate court may not only affirm or reverse the judgment below, but may modify it or make an entirely new decree, in accordance with its own views of the justice of the case. (*Burns, Ecc. L. Titles, Appeal and Practice, Vol. 1, p.* 57, *a*; *Vol.* 3, *p.* 329.) In the present instance, the court above, instead of merely reversing the Surrogate's decree, went further, and adjudicated the only question of law and of fact involved in the case, adjudging "that the said Catharine Ann is the lawful issue of the said George Messerve." This judgment was affirmed by the Court of Appeals, and the point so determined is irrevocably settled so far as the present controversy is concerned. (*Stafford vs. Bryan*, 2 *Paige*, 45; *Lyon vs. Dyckman*, 6 *Paige*, 478.) The case is remitted to me, with directions to proceed in

the accounting of the executors, on the basis of the legitimacy of Mrs. Clayton and the validity of her claim ; and I have, therefore, nothing to do but to settle the accounts on that footing. I must, consequently, refuse to receive any evidence upon the subject of the validity of Mrs. Clayton's demand as the issue of George Messerve, on the ground that the decree of the Supreme Court is conclusive as to that question.

It appears, on the accounting, that the executors of Sutton have made distribution of some portion of his estate, among his children and legatees, and have also paid some of his debts in full. The estate now turns out to be insufficient for the payment of all the claims against it. Though the executors have acted in good faith, they are nevertheless liable to the creditors, to the full extent of all the assets of the deceased ; and these payments to the legatees and kin of the testator must be disallowed. It seems, however, that at the time of taking the inventory, the property directed by statute to be set apart by the appraisers, for the benefit of minor children, was not so apportioned. This error may still be corrected, and the value of the property may be allowed the executors, on account of the moneys advanced by them for the support of the minors.

The charges in the accounts for debts paid in full must also be stricken out, and the executors allowed only for the amount to which such creditor whose debt has been paid in full would be entitled rateably with the other creditors, on the decree now to be entered for a final settlement of the accounts. The losses suffered by the executors by these overpayments, could easily have been avoided by reserving the funds necessary to meet all claims of which notice had been received. The advertisement for claims, under the statute, affords sufficient protection to the executor or administrator, if he pays or distributes after the period for the advertisement to run has expired. If he pays before, it is at his own risk, and he should suffer, in preference to an innocent creditor.

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BLOODGOOD vs. BRUEN.

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## BLOODGOOD vs. BRUEN.

*In the matter of the Estate of THOMAS H. SMITH.*

THE will of the testator stated that he was desirous of making "a general disposition" of all his estate, real and personal; directed in the first place "all his just debts to be paid;" devised all his real estate to his "executors" on certain trusts, and among others in trust,—if his personal estate should be insufficient, "after payment of his debts," to pay legacies amounting to \$400,000, to his children and their issue,—that his executors "should sell such part of the real estate, as would enable them to make up and provide the said several sums." He gave all the "rest, residue and remainder" of his estate to his executors, and also empowered them, "whenever they should think it expedient, to sell all or any part of his real estate," provided that the change of the character of the funds should not change the disposition thereof.

THE executors having sold the real estate, were cited to account for the proceeds, by a creditor, the personal estate being insufficient for the payment of the debts. *Held*, That the Surrogate had power to call the executors to account for the proceeds of the sales, and to compel distribution in the same manner as if the proceeds had been originally personal property.

THE distinction as to legal and equitable assets, no longer prevails as to the proceeds of the sale of realty, but such proceeds, when the real estate is sold by order of the Surrogate, are distributed in the same manner to creditors as the personal estate. The only effective remedy provided by statute for the specific application of the realty to the discharge of debts, is vested in the Surrogate's Court.

Where the will *directs* a conversion of the real into personal estate, the money arising from the sale becomes legal assets in the hands of the executor, for which he is bound to account before the Surrogate. If a mere *authority* to sell is given to the executor, he may bring the proceeds into the Surrogate's office for distribution, as the proceeds of the sale of real estate.

IF the intention of the testator to charge the debts upon the real estate can be gathered from the will, and the executors have a power of sale under which they have acted, they may be cited to account and distribute,—the intention to charge the debts on the realty affecting the power so as to make it an imperative power in trust, tantamount to a peremptory order to sell in case of the personalty being insufficient to pay the debts.

IF the real estate is ordered to be sold for the payment of *legacies*, the Sur-

## BLOODGOOD vs. BRUN.

rogate has power to compel distribution at the instance of *creditors* or *legatees*.

Several suits may proceed in the same court or in courts of concurrent jurisdiction, by plaintiffs seeking an account of executors and administrators, and payment of their respective claims; but when a decree for a general account and distribution is made in one suit, and the other creditors are authorized to come in under the decree and obtain satisfaction of their demands, the other suits will be stayed. But if provision is not made in the decree, for the payment of the claims of all creditors, or allowing them to apply for payment under the decree, such other creditors are not barred from proceeding in their own suits to a final decree.

TUCKER & CRAPO, for *Petitioner*.

WILLIAM M. EVARTS, for *Executor*.

THE SUREGATE. The testator commenced his will by stating that he was desirous of making "*a general disposition*" of all his estate, real and personal. He then, in the first place directed "*all his just debts to be paid*," and in the next place devised unto his "*executors*," all his real estate *in trust*, to collect and divide the rents among his four children during their respective lives, and on the death of the last survivor, to apportion and convey the estate to and among the issue of his children, *per stirpes*: And upon the further *trust*, that if his personal estate should not suffice, "*after payment of his debts*," to pay legacies amounting to \$400,000, as subsequently provided in his will for the benefit of his children and their issue, then his executors "*should sell such part of the said real estate as would enable them to make up and provide the said several sums*."

The testator also gave a power to his executors, "*whenver they should think it expedient, to sell all or any part of his real estate*," with the restriction that no alteration or change of the funds from real to personal, or from personal to real, should change the disposition thereof, made in his will. He directed all the debts and incumbrances on his real estate to be paid out of his personal estate; gave legacies of \$30,000 to each of his four children, and required the

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BLOODGOOD vs. BRUEN.

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executors to invest \$280,000, and pay the income to his children for life, and on their death, the principal to their issue.

The question now presented is, whether, the executors having sold the real estate, they can be called to account in the Surrogate's Court, on the application of a creditor, the personal estate being insufficient for the payment of the debts.

Whatever doubt may once have existed, whether the proceeds of real estate devised to executors in trust to sell for the payment of legacies, were legal or equitable assets, it is now settled in England, that they are equitable assets; and, in a case where a devise of this kind was made, the property sold, and the legatee brought suit for his legacy in the Consistorial Court, a prohibition was granted by the Court of King's Bench. (*Barker vs. May*, 9 B. & C. 489; *Clay vs. Willis*, 1 B. & C. 364.)

But our statutes have largely changed the mode of enforcing the payment of the debts of deceased persons; and many of the rules which have prevailed at Common Law, and in the Spiritual Courts, are not applicable to our system of administering estates. The Surrogate is not only clothed with power to order the payment of debts out of the personalty; but, on the motion of the executor or administrator within three years after the grant of letters, or on the application of a creditor at any time after an account filed, he may proceed to order the sale of the real estate for the payment of debts. And the distinction as to legal and equitable assets, no longer prevails as to the proceeds of the sale of the realty; but they are distributed in the Surrogate's office in the same manner and course of administration, so far as respects debts, as the personal estate. (2 R. S. 3d ed., p. 169, § 42, p. 548, § 37; 3 R. S. 2d ed., p. 752, note to § 36.) The whole scope of the various statutory provisions on this subject, is obviously to place under the jurisdiction of the Surrogate the application of the entire estate of the decedent, real and personal, to the payment of debts, according to the same order and rule of dis-

tribution. Indeed, it would appear that the only effective remedy provided by the statute for the specific application of the realty to the discharge of debts, is now to be found in the Surrogate's Court. For though the heirs or devisees may be sued at law or in equity for the debts of the deceased, there is no longer a specific judgment or a decree for a sale of the real estate and distribution of the proceeds among all the creditors who may come in under the decree, according to the amount of their demands and their legal priorities, but each creditor must sue for himself, for the recovery of what the heirs or devisees are liable to pay him, after satisfying all legal priorities and the proportionate claims of other creditors. (*Butts vs. Gennung* 5 Paige, 254; *Morris vs. Mowatt*, 2 Paige, 586; *Wambaugh vs. Gates*, 11 Paige, 515.)

It is obvious, therefore, that when the executor has sold the real estate under a testamentary power, one of two results must take place: either that his sale and conveyance, give a good title and oust the Surrogate of his authority to compel a sale for the payment of debts; or, notwithstanding the execution of the power by the executor, the Surrogate may proceed at the instance of creditors to direct a sale, which will oust the title derived under the execution of the power. The latter result would be the proper legal conclusion; for a testamentary power is in the nature of a devise, and a devise cannot bar the authority of the Surrogate to order a sale of the realty. A title under an order of sale by the Surrogate, would prevail over a title by the devisee of a power. This affords a strong *a priori* argument why, when the executor has executed a power of sale under the will, he should be liable to account for the proceeds before the Surrogate.

In view, also, of the statutory provisions authorizing the Surrogate to decree the payment of debts and legacies, it has been held in the Court of Appeals that where the will directs an "out and out conversion" of the realty, the real estate upon the principle of equitable conversion is con-

## BLOODGOOD vs. BRUEN.

verted, from the death of the testator, into personalty, and the money arising from the sale becomes *legal assets*, in the hands of the executor, for which he is bound to account as personal estate. (*Stagg vs. Jackson*, 2 Bar. Oh. R. 86, 1 Comstock, 206; *Kellett vs. Rathbun*, 4 Paige, 102; *Clark vs. Clark*, 8 Paige, 152.)

There are two statutory provisions applicable to the sale of real estate under a power, and the distribution of the proceeds. By the 3d section of the act of April 17, 1822 (*Session Laws 1822*, p. 283), the Surrogate was authorized to call the executors to account for the proceeds of the sale of real estate, made by virtue of a power contained in a will, for the payment of debts or legacies. The language of this provision embraced all sales "*authorized to be made*;" and, as the phrase was altered at the re-enactment of the section in the Revised Statutes, from "*authorized*" to "*ordered to be made*" (2 R. S. 3d ed., p. 172, § 61), there can be no doubt it was intended to confine the power of the Surrogate to compel an account, to the cases where a sale was *directed* or *ordered*, and to exclude the case of a sale under a mere naked discretionary power. This construction is further strengthened by the enactment of section 75 of chapter 460 of the laws of 1837, which provides that the proceeds of a sale of real estate, made in pursuance of an *authority* given by any last will, may be brought into the office of the Surrogate for distribution, in the same manner as the proceeds of the sale of real estate, sold by the Surrogate's order for the payment of debts, are distributed.

The single point to determine, then, is, whether the Surrogate has power to compel an account and distribution under the sixty-first section of the statute, which runs in the following words,—“Where, by any last will, a sale of real estate shall be ordered to be made, either for the payment of debts or legacies, the Surrogate in whose office such will was proved, shall have power to cite the executors in such will named, to account for the proceeds of the sales,

BLOODGOOD vs. BEVEN.

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and to compel distribution thereof, and to make all necessary orders and decrees therein, with the like power of enforcing them as if the said proceeds had been originally personal property of said deceased, in the hands of an administrator."

Now, it cannot be contended with any plausibility, that there are any provisions in the will now under consideration, directing or ordering the executors to sell the whole real estate, and make an out and out conversion of all the realty into personalty. Nor can it be denied, on the other hand, that the will does contain express as well as implied provisions for a sale of so much of the real estate, as may be necessary for certain specific purposes. Without entering into a detailed enumeration of the authorities, I am satisfied that the effect of the introductory words "*being desirous to make a general disposition of all my estate, real and personal,*" and of the clause "*I direct all my just debts to be paid,*" in connection with the devise of "all the real estate," and "all the rest, residue and remainder" of his estate to the "*executors*" in trust, and the positive order to sell enough of his real estate to raise the \$400,000 legacies in case the personalty should be insufficient "*after the payment of debts,*"—that the effect, I say, of these various provisions, is to make the subsequent general power of sale, instead of a mere naked authority, an imperative trust power; and—though, standing alone, it looks like a simple power—to convert it into a positive direction or order to sell for all the purposes contemplated by the will. The ground I would put it upon is, that where the intention of the testator to charge the debts upon the real estate can be gathered from the will, and the executors have been clothed with a power of sale, under which they have acted, they may be cited to account and distribute, by creditors; the intention to charge the debts on the realty so affecting the power of sale as to make it an imperative power in trust, tantamount to a peremptory order to sell in case the personalty be insufficient to discharge the debts.

## BLOODGOOD vs. BRUES.

I regard the effect of such provisions as substantially creating a *conditional* order to sell. (*Taylor vs. Taylor*, 6 *Sims*, 246; *Henvell vs. Whitaker*, 3 *Russ*, 343; *Bradhurst vs. Bradhurst*, 1 *Paige*, 331; *Harris vs. Fly*, 7 *Paige*, 425.)

But I think, apart from this position, that the language of the statute is broad enough to meet the present case. In *Stagg vs. Jackson*, the devise was to the executors "in trust whenever they shall see fit to sell all or any part of my real estate." Before the devise, the testator directed his debts to be paid, and nothing further was said about debts all through the will. In this case the debts are directed to be paid, and the devise is in trust to the executors to sell so much of the real estate as shall be sufficient to raise the sum of \$400,000, in case there be not enough personalty, "after the payment of debts," to raise that amount. It seems to me incontrovertible that if the mandatory trust to sell to raise \$400,000, for these legacies, effected, as it undoubtedly did, an equitable conversion of the real into personal estate to that extent, the whole basis of the Surrogate's jurisdiction is gained. The realty is converted into personalty; for the payment of legacies, it is true, but no matter at present for what purpose. It suffices that the conversion is directed, and has been in fact made by the executors. The will wrought this result at the testator's decease. He ordered his executors to sell to raise \$400,000 legacies, and that made a conversion. What is to be done with the fund, and who have a right to call the executors to account and compel distribution, is another question, which I will now consider. It is too plain for disputation, that the legatees would possess that right. Everybody must concede that. But if the legatees possess the right, and creditors do not, what becomes of the estate? If the legatee can come in and take the funds, and the creditor must seek some other remedy, the conflict and confusion of rights and remedies will be perplexing. For example, the creditor might proceed to enforce the sale of the real estate by the order of the Surrogate, and yet the estate is already

sold, and the proceeds perhaps distributed. It seems obvious that the proper remedy to prevent such consequences would be to vest the Surrogate with general authority to call the executors to account, whenever the real estate, or any part of it, is *ordered* to be sold for any purpose whatever, *either* for the payment of debts *or* legacies; because such sale being *ordered*, the real estate becomes personal, and should be treated as such. Now, this is just what the statute has done. Its phraseology is in the alternative—whenever real estate shall be ordered to be sold “*either* for the payment of debts *or* legacies,” the Surrogate shall have power to cite the executors to account, and to compel distribution, &c. The principle of the jurisdiction conferred is the conversion into personalty; and the exercise of the jurisdiction attained by such conversion, is in nowise limited, and does not depend upon the persons or relations of the parties who invoke the power of the court.

That the legacies directed to be raised out of the real estate are personal, and remain so, notwithstanding the direction that any change of funds, from real to personal, shall not change the *disposition thereof*, seems to me plain. This restriction is an appendant to the general *authority* to sell, lease, mortgage, and improve property, and not to the *order* to sell to raise legacies. And then again, the direction itself admits the “*change*” from real to personal, but says it shall not “*change the disposition*” of the property, but it shall stand to the same uses as if it had not been changed. These provisions palpably refer to the discretionary authority given to the executors, contained in this particular section of the will. If they did not, but were intended to apply to the land directed to be sold for the legacies, or to the legacies themselves, it would not affect the present question. It is beyond any man’s power to direct that land ordered to be sold for legacies shall, when so sold, stand to the same uses as if not sold. Such a construction involves an absurdity.

The executor, however, sets up, that in a suit pending

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BLOODGOOD vs. BRUEN.

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in the Supreme Court, *Iddings vs. Bruen*, an account has been directed and the claims of creditors provided for. It remains for me, therefore, to consider whether such proceedings have been had in any other court of concurrent jurisdiction, as should bar the claimant from proceeding here. It seems to me that the rule in this respect is well settled. Creditors, distributees, and legatees, may bring suits for their own individual claims. There may be a hundred such suits at the same time, and if the executor or administrator admits assets, the suit passes to a decree in each case. If assets are not admitted so as to warrant a personal decree against the executor or administrator, an account becomes necessary; and then, for the purpose of preventing multiplicity of proceedings and unnecessary expense, the court may order a general account, and decree general distribution. In order to have a decree for a general account and distribution, it does not seem necessary, according to our practice, that the bill should be filed for the benefit of the complainant and all other parties in interest; but when assets are not admitted, and an account is requisite, such a decree may be made even where the creditor sues in his own name, and for his own debt only. (*Ross vs. Crary*, 1 *Paige*, 416. *Hallett vs. Hallett*, 2 *Paige*, 15.) When, either in such a suit or where the creditor sues not for his own debt alone, but for himself and all other creditors, a decree is obtained for account and distribution, this is in the nature of a decree for all the creditors; and the other creditors may come in under it, and obtain satisfaction of their demands equally with the plaintiff. There may be any number of such suits pending at the same time; but as a single decree for a general account and distribution meets the object of all of them, it follows that when one such decree is entered in one suit, the others ought to be stayed, their purposes having been accomplished. This is ordinarily done by stay of proceedings or injunction. (*In the matter of the*

*City Bank of Buffalo*, 10 *Paige*, 378. *Rogers vs. King*, 8 *Paige*, 210.)

But until decree, each plaintiff is *dominus litis* ; and the sole question, therefore, is whether such a decree for account and distribution has been made in any suit against this executor, as will enable Bloodgood to come in, prove and recover his debt in due course of administration. The bill filed in the suit of *Iddings v. Bruen* was only for the protection of the rights of the complainant ; but, as already shown, that is not material, if subsequent provision for all the creditors of Thomas H. Smith has been properly made. The decree, in that case, after settling the amount due the complainant, proceeded to direct a sale of the real estate, under the power contained in the will, and the deposit of the proceeds in the name of the executor, to be withdrawn only for the purpose of the payments therein directed, except by order of the court. That decree also provided for the payment of the complainant's debt as established, "or so much of said debt as there shall be funds sufficient to pay, after paying to or reserving for the other creditors of the estate of Thomas H. Smith, if any there shall prove to be, the rateable proportion of the assets of said estate, to which such creditors, if any, are or may be entitled, in due course of administration of the said estate." It also contained a clause that the complainant and "the defendant, Herman Bruen, as executor of the last will and testament of Thomas H. Smith, may at any time, and from time to time, apply to this court, by motion or petition, upon the foot of this decree, for further directions in respect to the claims of any other creditor or creditors of the estate of Thomas H. Smith ; and in respect to any other matters as to which further directions may be proper, any of the parties are to be at liberty to apply in manner aforesaid, as they shall be advised."

By an order made in the cause, March 8, 1850, it was provided that in the administration by Herman Bruen, as executor of Smith, of the proceeds of the sale of the real

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BLOODGOOD vs. BRUEN.

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estate, it should be his duty to reserve, as well for the creditors of the late firm of Thomas H. Smith & Son as for the other creditors mentioned in the previous decree, "the due and proper proportion of the assets of said estate, to which such partnership creditors might be entitled in due course of administration."

On the 7th of September, 1850, the executor presented his petition to the Supreme Court, in the suit of *Iddings v. Bruen*, asking for further directions "in respect of the claims of other creditors of the said estate, and in respect of any surplus of the said estate after the payment of said debts, to the end that it may be ascertained what are the debts of said estate, and to whom payable, and the amount payable to each creditor, and the pro-rata distribution of said estate among said creditors; and that it may also be ascertained, whether after the payment of the debts of said estate there will be any surplus of said estate, distributable under the will, and the amount of such surplus, &c.:" and that, "by advertisement or otherwise under the order of the Court, the creditors of the estate may be ascertained; and that it may be referred to a suitable referee to take proof concerning said debts, and concerning all claims upon the estate, and to pass the accounts of the petitioner under the decree in said cause, and to ascertain and determine the amount still further payable to H. E. D. under said decree, and the amount to be reserved by the petitioner, to meet or to be paid upon the other debts of or claims upon the estate, and to ascertain and determine the amount of any surplus which will remain in his hands after the payment of the debts of said estate."

Upon this petition, an order was made referring it to a referee "to ascertain who are or claim to be creditors of the estate of the said Thomas H. Smith, deceased; to take proof concerning their demands respectively; to examine and pass the accounts of the said petitioner under the decree in this cause; to ascertain and determine the amount still further payable to H. E. D. under the said decree,

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BLOODGOOD vs. BRUM.

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and the amount which ought to be reserved by the said petitioner, to meet or to be paid upon the other debts of or claims upon the estate of Thomas H. Smith, and to ascertain and determine whether, if, after the payment of the debts of the said estate, any and, if any, what surplus of the estate will remain in the hands of the petitioner for distribution under the will, &c." The order provided for the usual notice, and advertisement to creditors to exhibit their demands, and for payment to H. E. D. of his proportion in due course of administration.

This order was amended on the 23d day of September, 1850, so that the payments made to H. E. D. should not be allowed the executor as a conclusive credit, unless the same were properly made in due course of administration.

Under these orders, the petitioner, Bloodgood, has appeared before the referee and presented his claim. His counsel allege, that his appearance there was under protest. I think it immaterial whether he appeared under protest or not. He certainly had a right to appear and protect his interest; and if that proceeding is not one in which he can have a decree or order for the payment of his demand when established, his appearance cannot prejudice him so as to prevent his obtaining his rights in due course of law.

Neither the institution of the Iddings suit, nor the decree therein, nor the petition of the executor, nor the orders thereon, nor the subsequent proceedings before the referee, have ousted the Surrogate of his jurisdiction. None of these proceedings are formally instituted in behalf of creditors, and no provision is made in the decree or orders, for the payment of the claims of creditors, or allowing them to apply for payment under the decree. The frame of all the proceedings is precisely in consonance with what takes place in the suit of a creditor for his own benefit; and the account directed is merely for the purpose of ascertaining the amount due the plaintiff, and not for the purpose of distribution. I have looked into the prece-

dents, and find that the usual directions contained in a decree for the administration of an estate, are to take an account, and to advertise for creditors to come in and prove their debts; and the decree declares that such creditors as do not come in shall be excluded from the benefit of the decree; and also, expressly directs that the estate be applied in due course of administration, and that any of the parties may be at liberty to apply to the court under the decree. (2 *Smith, Ch. Pr.*, 276, 330.) These provisions are not made for the benefit of the creditors of Thomas H. Smith, in the proceedings before me. The suit instituted by Iddings, was not in form an administration suit; that character has not been given to it by any of the orders, or subsequent proceedings; and up to this moment, there is no formal provision or direction, giving the creditors a right to distribution. The pendency of that accounting, therefore,—it being, in its present shape, only for the benefit of certain, and not all the creditors,—is no reason why the other creditors should be inhibited from collecting their demands, and having the account necessary for that purpose, in a suit of their own institution and under their own control. If the executor had asked for a final accounting and a decree for distribution in the Iddings suit, and had obtained an order for that purpose, other proceedings would have been unnecessary and improper. He has not done so; and the petitioner in this case must, in order to recover his demand, prosecute the executor in some form or other. It is no answer to the present application that the executor must be exposed to an accounting whenever any creditor institutes suit; because such an evil as that can be obviated by the executor at any moment, by asking for a final account and distribution.

While I am clear that no such decree has been made in the Iddings suit as should deter any court having jurisdiction, from entertaining it, at the suit of any other creditor, and that the appearance of the creditors before the referee, and the proof of their debts, does not under the terms of

the order for an account, entitle them to relief in that proceeding, and therefore, does not exclude them from obtaining proper relief in the Supreme Court, or in any other court having jurisdiction; I am still disinclined, unless it shall be necessary, to put the executor to the expense and trouble of a double accounting. It is the privilege of the executor, on being directed to account, either before the Surrogate or in any other court, to ask for a final accounting and administration of the estate. If he fail to ask for and secure this privilege in a suit instituted by a creditor for his sole benefit, it is his own fault that he is put to inconvenience by the institution of a suit by another creditor. If it be the design and intention of the present reference and accounting pending in the Supreme Court, to have such a final accounting and administration of the estate, there is no good reason why it should not be formally expressed in some way or other, upon the face of the proceedings; and should that be done, then every consideration of propriety and convenience is in favor of the administration of the fund, and the settlement of the executor's accounts by the Supreme Court.

I have, therefore, come to the conclusion, to order the executor to account before me, unless within a reasonable time he procures such a modification of the order of September 7, 1850, in the Iddings suit, as shall in terms secure to the creditors of Thomas H. Smith, the right on proof of their claims, to compel payment in due course of administration.

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EX PARTE, BROWN.

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EX PARTE, BROWN.

*In the matter of the Estate of DORCAS M. REMSEN, deceased.*

The direction of the statute, that administration with the will annexed shall be granted to the residuary, general, or specific legatees, or to the widow or next of kin, or to creditors "in the same manner and under the like regulations and restrictions, as letters of administration in case of intestacy," makes it necessary to require a bond with sufficient sureties, in all cases—as well where the grant is made to a legatee as where it is made to the widow, next of kin, or creditors.

The section requiring "every person appointed administrator" to execute a bond, includes an administrator with the will annexed. In general, the term "administrator," in the statutes relative to the estates of deceased persons, includes "administrators with the will annexed;" and the latter are subject to all the provisions applicable to administrators generally, except so far as the distribution of the estate is directed by the will.

A. R. DREW, for *Administratrix*.

THE SURROGATE. The will of the deceased has been proved before me, and the executor having renounced, one of the legatees applies for letters of administration with the will annexed, and claims that the same should be granted without any bond being required. The section of the statute under which this application is made, provides that if all the persons named in a will as executors, shall renounce, or after being duly summoned to appear and qualify, shall neglect to qualify, or shall be legally incompetent, then letters testamentary shall issue, and administration with the will annexed be granted, as if no executors were named in such will, "to the residuary legatees or some or one of them, if there be any; if there be none that will accept, then to any principal or specific legatee, if there be any; if there be none that will accept, then to the widow and next of kin of the testator, or to any

## EX PARTE, BROWN.

creditor of the testator; *in the same manner and under the like regulations and restrictions, as letters of administration in case of intestacy.*" (2 R. S., p. 136, 3d ed., § 15.) It is contended that the words of the section just quoted in italics, apply only to the last class of persons entitled to administration, and not to the two previous classes, viz., the residuary and the specific, or general legatees. The result of such a construction, having regard only to this section, would be that the usual regulations and restrictions in relation to administration in case of intestacy, are applicable to administration with the will annexed only when granted to the widow, next of kin, or creditors. It would consequently follow, that a residuary or other legatee might administer without giving a bond with the requisite sureties. I do not think this a proper mode of interpretation, but on the contrary, am of opinion that the final clause of the section and the regulations and restrictions there referred to, are applicable to all the preceding provisions relative to administration with the will annexed.

Again, by the 43d section of the statute (2 R. S., 3d ed., p. 141), it is provided that "every person appointed administrator, shall, before receiving letters, execute a bond to the people of this State with two or more competent sureties, to be approved by the Surrogate, &c." Now, although, throughout the statute, an administrator with the will annexed, is frequently distinguished from an administrator in case of intestacy, yet I conceive that the word administrator is sufficiently broad and comprehensive to embrace every kind of administrator, whenever no distinction is made; so that the direction requiring "every person appointed administrator" to execute a bond, of necessity includes an administrator with the will annexed. Indeed, if these two sections (§§ 15, 43), are not to be interpreted in this way, the statute is grossly deficient in securing the accountability and control of an administrator with the will annexed. Unless the word administrator be construed to cover an administrator with the will an-

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DUDLEY vs. GRISWOLD.

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nexed, there is no mode provided by law for compelling him to make an inventory, to account and distribute the estate; and in truth, he would in almost every important respect, be exempt from the supervision and control of the Surrogate. Such an idea cannot prevail for a moment; and I have no hesitation, therefore, in applying to administrators with the will annexed, as a species or class of administrators, all the provisions of the statute applicable to administrators generally. The applicant in this case, must consequently give the usual bond, before the letters can be issued.

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## DUDLEY vs. GRISWOLD.

*In the matter of the estate of NATHANIEL L. GRISWOLD, deceased.*

On an application for leave to issue execution upon a judgment against an executor, for costs occasioned in the defence of a proceeding instituted by the executor, the latter claimed to offset a judgment against the applicant recovered by C. B., and assigned to the executor. Held, that as the judgment for costs, was in terms against the executor in his representative capacity, and *to be paid out of the assets of the deceased*, it must abide the course of distribution of the estate. The judgment purchased by the executor belongs to him individually. To authorize a set-off, the debts must be mutual, and due to and from the same persons in the same capacity. It is against sound policy to permit executors to buy up claims against creditors of the deceased, for the purpose of obtaining a set-off in equity,

D. T. WALDEN, *for applicant.*

The application should be granted.

I. The judgment of Dudley is against, and *payable out of the estate* of Nathaniel L. Griswold, deceased. It is *a debt due from the estate.*

## DUDLEY vs. GRISWOLD.

The judgment which they seek to set off, has been purchased by the executors since the death of the testator.

II. An executor cannot, either at law or equity, set off a demand purchased by him after the death of the testator against a debt due by the estate. (*Mead v. Merritt*, 2 *Paige*, 402; *Hills v. Tallman's ad'm.*, 21 *Wend.* 674; *Dale v. Cook*, 4 *J. C. R.*, 13.)

"It would be inconsistent with the principles of sound policy to permit an executor to buy up claims against creditors of an estate for the purpose of obtaining a set-off in equity." (*Per Chancellor*, 2 *Paige*, 405.)

III. To whom does the purchased judgment belong? If to the executors individually, the objection is insuperable: the debts exist in different rights. If they hold it as executors, it belongs to the estate, and must be applied in the usual course of distribution. (*Per Nelson, Ch. J.*, 21 *Wend.* 675.)

IV. In actions *against* executors, the statute allows a set-off of demands, only, which belonged to the *testator*. (2 *R. S.* 451, § 46, 3d *ed.*) And such is the rule of law and equity. (*Murray vs. Toland*, 3 *J. C. R.* 574; *Dale vs. Cooke*, 4 *ib.* 13; *Harvey vs. Wood*, 5 *Mad.* 459; *Richbourg vs. Richbourg*, 1 *Harp. Ch.* 168.)

V. There is no mutuality. Dudley could not set off this judgment against the one held by the executors, even if they have purchased for the estate. (*Fry vs. Evans, ad'm.*, 8 *Wend.* 530; *Irving vs. De Kay*, 10 *Paige*, 323; *per Chancellor*; *Crews vs. Williams*, 2 *Bibb.* 263; *Dale vs. Cooke*, 4 *J. C. R.* 13; *vid. Nelson Ch. J.* 21 *Wend.* 675.)

VI. Applications to set off judgments are addressed to the discretion of the court, which discretion will be so

## DUDLEY vs. GRISWOLD.

exercised as to do equity, and not to sanction fraud. (*Barb. Set off*, 32, 33, and cases cited below.)

This application is made for the express purpose of defeating the attorney's claim for costs; and although, as a general rule, courts of law do not recognize the attorney's lien, yet in the exercise of a sound discretion, they will not, in some cases, permit a judgment to be set off, to the prejudice of the attorney's claim. (*Dunkin vs. Vandenburg*, 1 *Paige*, 622; *Bradt vs. Koon*, 4 *Cow. R.* 416; *Smith vs. Loudon*, 1 *Sandf. S. C. R.* 696; *Gihon vs. Fryatt, &c.* 2 *ib.* 638; *Ainslie vs. Boynton*, 2 *Barb. S. C. R.* 258.)

T. H. RODMAN, for Executor.

Points on part of the executor.

I. The judgment of Dudley was not recovered *against* the testator, nor upon a cause of action *accruing against him*.

The transaction out of which the liability arose, was between Dudley and the executor personally, in his character as executor; and Dudley's judgment is against the executor personally in his character as executor.

The judgment *against* Dudley was recovered long *after the death of the testator*. None of the cases cited by the counsel of the creditor to show that the judgment against Dudley would not be set off *in an action* at law or in equity, apply to this case.

It is admitted, for it is settled law, that *in an action* a demand against the testator or intestate cannot be set off against a demand which accrued to the executor or administrator, *after the death of the testator or intestate*; and, *e converso*, a demand which accrued against the executor or administrator, cannot be set off against a demand which accrued to the testator or intestate.

The death of the testator is the boundary line which divides the two classes of demands. Demands of either

class may be set off against each other, but not against those of the other class. And the reason is, that the allowance of the latter proceeding would alter the course of distribution.

But if the executor be sued *in an action*, the maintenance of this rule does not exclude, as a set-off, a demand which accrued to him as executor: on the contrary, the enforcement of the principle of the rule would allow it. In the present case, if Dudley's claim be allowed and collected, he will get the whole amount of his debt: *while the creditors of the testator* might be left to share *pro rata* in the residue, including the balance of the judgment against him.

They are proper subjects of set-off, according to the principle in *Irving vs. De Kay*, 10 *Paige*, 323.

II. But this question does not arise in *an action*: and the statutes of set-offs have no application to this case. They apply only to *actions* by and against executors, &c. (2 *R. S.*, 451, § 46, 3d ed.) The practice of setting off judgments does not at all depend on the statute of set-offs, but upon the jurisdiction of the courts over the parties and over their own process. (*Savage Ch. J.*, *People vs. N. Y. Com. Pleas*, 13 *Wend.* 651.)

"It is true," he adds "that it is in pursuance of the policy of the statute, and as was said by De Grey, Ch. J. in *Barker vs. Braham*, 2 *Black*, 869; 3 *Wils.* 396, *S. C.*, the courts have gone a little further than the letter of the statutes. By the rule of analogy, in the cases within their power, costs have been set off against costs, and also against debt and costs."

In this case this court is perhaps strictly bound by neither the statute, nor the practice of the courts of law. It is a question of indebtedness, arising on an *accounting*, peculiar to this tribunal.

If the court is satisfied that there is a *judgment due*, and which could be enforced in the court in which it was

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DUDLEY vs. GRISWOLD.

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recovered, and to which the assets should be applied, he must allow the execution to issue.

If, on the contrary, the judgment appear to be paid, or not legally or equitably due, on account of the existence of a valid set-off in the hands of the executors: he cannot, in justice to the creditors of the testator, or his devisees, allow the execution.

III. The attorney's lien or claim cannot arise here. Dudley is the creditor. The attorney claims that his *client shall be paid*.

In opposition to that, the executor shows a balance against the claimant, by the set-off of a legal ascertained demand of equal character, and thus proves the claimant to be a *debtor*, instead of creditor, of the estate.

IV. In the Supreme Court, where both judgments were recovered, the set-off would be allowed, without regard to the attorney's lien.

The law on this point was settled by the Court of Errors in *Nicoll vs. Nicoll*, 16 *Wend*, 448, overruling *Dunkin vs. Vredenburg*, 1 *Paige*, and all the other cases where the contrary doctrine was declared, and establishing the doctrine that the attorney's lien must yield to the equitable right of set-off, and that the latter claim in equity overrides the former.

The facts there were almost identical with those presented to the court.

The smaller judgment was for *costs* alone. The set-off was allowed, and the Court say the Supreme Court would have at once allowed it. The attorney is supposed to look to his client personally for his compensation. The court will protect him from injury by collusion or fraud between the suitors; but his claim cannot intervene to defeat the equitable right of set-off of the opposite party, who would otherwise be bound to pay the judgment, and look, perhaps, to his insolvent client for his large debt.

In *Ferguson ag's't Backett*, 4 *Howd. Prac. Rept.* the doctrine is fully examined, the cases cited and discussed, and the principle settled in *Nicoll vs. Nicoll* followed in the decision.

V. Dudley could set off this judgment against that of the executor.

The cases cited to show the contrary doctrine prove this. In *Irving vs. De Kay*, 10 *Paige*, the set-off was denied because Mrs. De Kay's claim was against the *testator*, and the bond and mortgage sought to be enforced were given to the *executors personally*.

If her claim had been against the executors it would have been set off.

In the language of the Chancellor in *Dale vs. Cook* (4 *J. C.*, 13), cited on the other side, "the debts must be mutual, and *due from the same persons in the same capacity*."

The judgments in question are so.

**THE SUREGATE.** Julius Dudley recovered a judgment for \$150 in the Supreme Court, in June, 1851, against Nathaniel L. Griswold, as executor of the deceased. The judgment was for costs accrued in the defence of a proceeding instituted by the executor, for the removal of Dudley from premises leased to him by the executor.

Upon an application for leave to issue execution upon this judgment, the executor claims an equitable offset, on the ground that he is the owner of a judgment in the Supreme Court against Dudley, recovered by Conklin Brush, May 17, 1848, and assigned to Griswold as executor, December 20, 1850.

There can be no doubt that an executor or administrator cannot set off a debt due to him personally, or purchased by him since the death of the testator or intestate, against a demand due by the estate of the deceased, or accruing in the life-time of the deceased. The question is whether that rule is applicable to the present case. A court of

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DUDLEY vs. GRISWOLD.

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equity will, in regulating the right of set-off, regard a debt as due in the right of him who is beneficially entitled to it; but the rule prevails as well in equity as at law, that demands due in different rights cannot be set off against each other. The consequence is that the executor cannot set off against a demand upon him as executor, a debt due to him individually.

In the present case, the judgment for costs is against the executor in his representative capacity, and the amount is to be collected of *the assets of the deceased*. (2 R. S., 3d ed., p. 152, § 34; p. 178, §§ 21, 22; p. 706, § 23; p. 709, § 44.) It stands, then, in effect as if it were a debt against the testator, and *it must abide the course of distribution of his estate*. Now, suppose the case reversed, and a creditor of the executor individually should seek to set off a debt due to him personally, against a demand due by him to the testator. That could not be, because it would alter the course of administration, and in the case of an insolvent estate, secure to a debtor of the estate the means of defeating the right of creditors of the estate to a rateable share of the assets. For the same reason, if an executor sues for a debt created in his favor since the testator's death, the defendant cannot set off a debt due to him from the testator. To authorize a set-off, the debts must be mutual, and due to and from the same persons in the same capacity. Therefore, a debt arising with the executor, cannot be set off against a debt due from the testator. The judgment for costs in this case is substantially, though not in form, the same as a debt against the testator; it is against the estate, and to be paid out of the assets, rateably with other debts. The judgment sought to be set off, has been purchased by the executor since the testator's decease, and as between these parties, is to be treated as the individual property of the executor. The principles on this subject appear to be well established; and I think the set-off claimed, cannot be allowed without making a serious inroad upon the established course of administra-

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DUDLEY vs. GRISWOLD.

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tion of estates. (*Duncan vs. Lyon*, 3 J. C. R., 351 ; *Dale vs. Cooke*, 4 J. C. R., 11 ; *Fry vs. Evans*, 8 Wendell, 530 ; *Hills vs. Tallman's administrator*, 21 Wendell, 647 ; *Irving vs. De Kay*, 10 Paige, 323.) Besides, I am satisfied that it would, in the language of the late Chancellor, "be inconsistent with the principles of sound policy to permit an executor to buy up claims against creditors of an estate for the purpose of obtaining a set-off in equity." (*Mead vs. Merritt*, 2 Paige, 405.) The business of an executor or administrator is to settle the estate, pay the debts and distribute the surplus, and not to speculate in demands against the creditors. It is not a legitimate purpose for which to employ the trust funds, to buy up debts against claimants ; and if he does so he must take the risk of such dealings upon his own individual responsibility. On the other hand, if such transactions be lawful, the money advanced to purchase such claims may be legally charged to the estate ; and the consequences of such a doctrine may, in many cases, be most disastrous. There might be no harm accruing in this particular instance, but a bad rule always overcomes in permanent evil any transient and partial benefit. I must, therefore, permit the execution to issue, unless insufficiency of assets be alleged.

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EX PARTE, M'DONNELL.

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## EX PARTE, MCDONNELL.

*In the matter of the Estate of MICHAEL McDONNELL, deceased.*

THE appointment of an executor may be express or constructive, and though a person be not appointed executor by that name, yet if the testator commit to his charge duties which it is ordinarily the province of an executor to perform, the intention to invest him with that character may be inferred.

Where the testator by his will said, "After all my just debts being paid, I wish my brother E. M. D., to *invest* all my property, consisting of a farm, &c., six hundred dollars, &c., in the Greenwich Savings' Bank, &c., and chattle property *when converted into cash*; and the interest accruing thereupon to be transmitted to my father; and the capital, at my father's death, to be divided among my three brothers,"—Held, that E. M. D. was designated to execute the will, and was executor according to the tenor.

A. THOMPSON, *for Executor.*

THE SURROGATE. Edward McDonnell applies for letters testamentary on the will of the testator, on the ground that he is executor *according to the tenor*. Though the executor can only derive the right to his office from a testamentary appointment, yet it is well established that his appointment may be either express or constructive. This, like all other questions of testamentary construction, is a question of intention, to be ascertained from an examination of all the provisions of the will. The rule seems to be that, although an executor be not nominated in precise terms, yet, if by *any* words the testator commit to any person the charge of those duties which it is ordinarily the province of an executor to perform, the intention to invest him with that character may be inferred. (*Toller*, 35; *Williams on Executors*, 186.)

The testator bequeaths as follows, "After all my just

debts being paid, I wish my brother Edward McDonnel, to invest my property, consisting of a farm near Dubuque; about six hundred dollars in the Greenwich Savings' Bank; one hundred and fifty dollars owing to me by my said brother, E. McD., and one hundred dollars lent by me to J. McD; my stock of liquors and chattel property, when converted into cash,—the whole amount to be invested in some safe bank in the city of New York, and the interest accruing thereupon to be transmitted semi-annually to my father; and the capital at my father's death, to be divided, share and share alike, among my three brothers." It is very manifest that the testator has here committed the administration of all his estate to his brother Edward. The words "after all my just debts being paid," if they were followed by a mere gift would throw a doubt over such a construction. But they are in immediate connection with the bestowal of powers identical with those of an executor, such as the collection, sale and conversion of his estate into cash, its investment, the payment of the interest, and the distribution of the principal. It could not have been designed to entrust these important duties to his brother, and commit to an administrator the payment of his debts; on the contrary, the most sensible reading seems to be that the payment of debts, as well as the other executory powers mentioned in immediate connection, were all intended to be committed to the charge of the same person, instead of being broken and separated. It thus appearing that the testator designated his brother as the person to *execute* his will, and the use of the word "executor" not being essential to the appointment, letters testamentary may issue to the applicant.

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THE ROMAN CATHOLIC ORPHAN ASYLUM vs. STRAIN.

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## THE ROMAN CATHOLIC ORPHAN ASYLUM vs STRAIN.

*In the matter of the Estate of WILLIAM HARKIN, Deceased.*

The intestate deposited with R. R. B. H. certain sums, taking a certificate that the same had been deposited by "*William and Ellen Harkin*;" Ellen Harkin, the wife of William, survived her husband. *Held*, that it was in form a joint deposit; that having been made in this mode, with the privity of the husband, it was *prima facie* a gift to her in case she survived; and that, not having been disturbed in the lifetime of the husband, it became, on his decease, the absolute property of the wife.

T. J. GLOVER, for the Roman Catholic Orphan Asylum.

The evidence shows that William Harkin, the husband, and Ellen Harkin, the wife, deposited \$1,400 in their joint names with and took from the Rt. Rev. Bishop Hughes a certificate of deposit, or promissory note, shewing that they had so deposited that sum—the same to be returned at *any time after two weeks' notice*, with interest at 5 per cent.

William Harkin died intestate in the summer of 1849, leaving two children and his widow Ellen. At the time of his death, the said sum still remained on deposit the same as before. Shortly after William's death, Ellen, his widow, also died, leaving a will, whereby she gave this \$1,400 to her two children, and if they died before twenty-one, then to the Orphan Asylum. The children are both dead, and the Asylum claims the whole of this sum.

The right of the Asylum is not questioned, provided the fund belonged to Mrs. Harkin. If it was hers to give, there is no doubt of the validity of the gift to the Asylum; and her right to give it depends upon the question whether it became hers by survivorship.

The general doctrine of the right of the husband to reduce into his own possession all the personal property

and choses in action of his wife during coverture is not disputed. Nor is it necessary to deny, that William Harkin might during his lifetime have called in this deposit, and himself have lawfully discharged the security. But we say that upon the common-law doctrine, where any kind of property or security is taken (though it be by the husband alone) in the *joint names of himself and wife*, and he dies first, not having disposed of it, the wife takes such property or security as her own by *survivorship*. The principle seems to be general, and is based upon the idea that the husband intended such to be the result, from the fact of taking the property or security in their joint names; and, indeed, the fact is without meaning, and of no effect, unless this result is attached to it.

See, the cases and text, *Bright's Husband and Wife*, by Lockwood, Vol. 1, p. 32.

Where money was lent by the husband, and the security taken in the joint names of *himself and wife*, she was entitled by survivorship. (*Watts vs. Thomas*, 2 P. Wms., 364, cited in *Bright, ubi supra*.)

A note to husband and wife survives to her. (*Richardson vs. Daggett*, 4 Verm., 336.) So of a note and mortgage. (*Draper vs. Jackson*, 16 Mass., 480.) The same of a bond. (*Briggs vs. Beach*, 18 Verm., 115.) And a judgment. (10 Johns. R., p. 51.)

2nd. The property of the wife in this deposit, by survivorship, is still more strongly recognized in equity.

Where a husband purchased stock in the name of himself and wife, Lord Eldon said, it was *prima facie* a gift to her, in the event of her surviving. (*Wilde vs. Wilde*, *Coates vs. Steven*, cited in *Bright, ubi supra*.) Same point in *Craig vs. Craig*, 3. Barb. Ch. R., 76; *Kingdon vs. Bridges*, 2 Vern., 67; 8 Ves., 99; *Christ's Hospital vs. Budgin*, 2 Vern., 683.

The doctrine is shown by these cases not to be confined to instances in which the wife is the meritorious cause, by reason of having earned, or otherwise owning, the property

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THE ROMAN CATHOLIC ORPHAN ASYLUM vs. STRAIN.

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invested. It applies fully as well where the husband invests his own funds in the joint names of himself and wife.

3rd. It is objected that she calls it in her will the property of her husband, and that, therefore, it is to be deemed his. But by the same will she *disposes* of the *whole* of it. She exercises full and complete dominion over it, the highest evidence of the assertion of her rights. Is not that stronger proof of her title than the loose expression of an illiterate person, not chargeable with the niceties of legal accuracy?

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J. EDGAR, for Administrator of William Harkin.

Should the \$1,400 (or thereabouts) deposited with Bishop Hughes, in the joint names of William and Ellen Harkin, and since paid to Strain, as administrator of William Harkin, deceased, be considered as belonging to the estate of William Harkin, deceased, or to that of Ellen Harkin, deceased?

The facts in the case show that the only interest which the wife had in this money, before the death of her husband, was created by the deposit being made in the joint names of the husband and wife. The money was the earnings of the husband without doubt; and the wife afterwards, in making her will (See *Lib. 99 of Wills*, p. 143), must have considered it his money, as she calls it such; but she misconceived her legal right to it, and therefore made provision for its use by her will. The money must be considered as belonging to him at the time of deposit, unless there be positive evidence to the contrary. There is no evidence that there was an intention on the part of the husband, in making the deposit in this manner, that it should be for the benefit of his wife.

The question, therefore, arises, whether the act itself without any known intention, was sufficient in law to

## THE ROMAN CATHOLIC ORPHAN ASYLUM vs. STRAIN.

create a joint interest for the wife; and also, whether such a deposit was a gift from the husband to the wife.

The money belonging to the husband, the deposit in the joint names of the husband and wife, did not divest him of his exclusive property in it. If the deposit had been made in her name alone, it would still have remained his property. The same law will apply to this deposit which relates to deposits in savings banks, or any other institution for deposits, or to money in possession. The husband, at any time before his death, could have drawn this money, and no one else could legally; and after his death the money vested in his administrator, and he alone was legally authorized to collect it. The Bishop so considered it at the time, or he would not have paid over the money to Strain and taken his receipt as administrator of William Harkin, deceased.

There is no evidence that it was intended as a gift from the husband to his wife; and, even if there were, it is doubtful whether such would be a legal gift.

At common law, a gift from the husband to the wife was void, and we have no statute altering that law, except the gift be made through a trustee specially appointed for the purpose, and named definitely as such. A trusteeship cannot be implied. In this case there was no trustee named, nor can one be implied.

The opposing counsel quoted *Lockwood's Bright's Husband and Wife*, p. 32, §§ 14, 15, 16, 17, and 18, in relation to such gifts—which is English law; but even by that law “there must be satisfactory evidence that the husband has divested himself of the property, and agreed to hold it as trustee for his wife.” *Id.*, § 21.

From the reports of cases in this and other States of the Union, it will be seen that there have been many contradictory decisions in relation to the right of survivorship of the wife; but there is no decision supporting the right by survivorship of the wife, in a security given to the husband and wife in their joint names, unless the wife was distinctly specified, or shown to be the meritorious cause of such

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THE ROMAN CATHOLIC ORPHAN ASYLUM vs. STRAIN.

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security. And further, these securities are almost invariably created by third persons, and not by the husband.

The case in 10 *Johns. R.*, p. 51, quoted by the opposing counsel, was that of a bond given for the maintenance of husband and wife "during their joint and several lives." By the condition of the bond, the survivor was specifically named as entitled to the benefit of the bond. Also, in the case in 4 *Verm. p.* 336, "the wife was shown to be the meritorious cause of the note, and the interests of creditors of the estate were not involved." And so of all the other cases quoted by the opposing counsel.

The following cases are offered as relating to the subject:

"Money in the hands of a wife at the decease of her husband, earned and received by her before the marriage, or given to her by her husband afterwards, passes to his administrator." (*Washburn vs. Hall*, 10 *Pick.*, 429.) Same doctrine in 2 *Conn. Rep.*, 564; 14 *Conn.*, 99; 1 *Hill S. C.*, 191.)

"Money deposited in a bank by a married woman, who with her husband's consent lives separate from him, and is not supported by him, is his money, although it is deposited in her name." (*Ames vs. Chew*, 5 *Met.* 320.)

"Money paid to the wife is paid to the husband, whether he ever received it or not." (*White vs. White*, 2 *How. Miss.*, 931.)

The case of *Dacy vs. Chemical Bank*, 2 *Hall*, 550, cited by the opposing counsel, was decided on the question of agency, and not of survivorship; and the inference is, that the bank would have been held responsible if it had been shown that they knew the depositor to have been a married woman.

"A note payable to a *feme covert*, is payable to her husband, who alone has power during his life to enforce payment, or discharge the demand; and after his death it will go to his executor or administrator, and not to the wife." (*Shuttlesworth vs. Noyes*, 8 *Mass.*, 229.)

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THE ROMAN CATHOLIC ORPHAN ASYLUM *vs.* STRAIN.

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"A note made payable to a married woman, is in law a note to the husband, and becomes instantly his property, and her endorsement transfers no property in the note." (*Savage vs. King*, 5 *Shep.*, 301; *See Chitty on Bills*, p. 23, &c.)

"A direct transfer from husband to wife, without a trustee, conveys nothing, though it respects the wife's interest." (*Parker vs. Stuckert*, 2 *Miles*, 278.)

"No agreement between husband and wife can be made during coverture which in legal effect will transfer, by way of gift or sale, any property from the husband to the wife." (15 *Conn.*, 587.)

The money ought to be considered as a part of the husband's estate, and should be accounted for and distributed as such.

**THE SURROGATE.** The intestate, William Harkin, deposited with the Rt. Rev. Bishop Hughes \$1,200, in the joint names of himself and wife, taking as evidence of the deposit a certificate stating that "William and Ellen Harkin have \$1,200 on deposit with the Rt. Rev. Bishop Hughes, to draw interest at five per cent. and to be returned at any time after two weeks' notice." Two other sums of \$100 each, were subsequently deposited in the same manner. Ellen Harkin survived her husband; and the point is now submitted, whether the sums so deposited, are to be accounted for as part of the estate of her husband, or belonged a moiety to each, or to her by right of survivorship.

It appears that the deposits were made in this manner for a series of years,—the first certificate being in the same form; and when the amount reached \$1,200, it was surrendered and a new certificate issued. The account in the books of the Bishop, was also kept in the names of husband and wife, in accordance with the certificate. There is no evidence beyond the certificate, except the impression of

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THE ROMAN CATHOLIC ORPHAN ASYLUM vs. SLRAIN.

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the Bishop's Secretary, that either party came to make the deposits. He also adds, that this joint deposit is a common, though not a usual form of depositing.

I must, therefore, decide the case upon the face of the certificate, which recites that William and Ellen Harkin had deposited \$1,200, to draw interest at five per cent., and to be returned at any time after two weeks' notice. In form it was a joint deposit, and if the depositors had not been husband and wife, there can be no doubt that such would have been its legal character.

The presumption of such a form is, that it was not without design. The transaction itself, the manner in which the deposit was made and the certificate taken, afford satisfactory evidence of the object or purpose. In *Christ's Hospital vs. Budgin*, 2 *Vernon*, 683, the husband had lent out money in the names of himself and his wife, upon bonds and mortgages taken in their joint names. The Lord Keeper regarded the wife as a joint purchaser, and as entitled to the securities by survivorship. In *Dummer vs. Pitcher*, 5 *Simon*, 35, a testator, before making his will, transferred two sums of bank annuities into the names of himself and wife, and afterwards bequeathed all his funded property to trustees. He subsequently purchased further sums in the stocks, in the names of himself and his wife, and died in her life-time, having no stock except that above-mentioned, exclusive of which his property was not sufficient to pay his legacies. It was held by Sir Lancelot Shadwell and affirmed on appeal by Lord Brougham, that the wife by surviving her husband became absolutely entitled to the sums of stock, there being "nothing to show that the husband intended that the transfers should have any operation but what they legally had." In *Coates vs. Stevens*, 1 *Yo. & Coll., Exgr. R.*, 66, the testator bequeathed £2,200 stock, "*his property*" standing in the joint names of himself and wife; and Lord Abinger held that the stock was the absolute property of the wife surviving, saying, "I am of opinion, upon all the decisions, that this is the absolute

## THE ROMAN CATHOLIC ORPHAN ASYLUM vs. STRAIN.

property of the defendant (the wife.) The transfers were made to the husband and wife in their joint names, and there is no evidence to show that these transfers were coupled with any trust." In that case, the authorities bearing on the question were copiously cited, and among them Lord Eldon's decision, in *Wilde vs. Wilde*, where he said, the purchase of stock by the husband in the joint names of himself and his wife, was *prima facie* a gift to her, in the event of her surviving, unless evidence was produced of contemporaneous acts showing a contrary intention. (See *Craig vs. Craig*, 3 Bar. Ch. R., 104; *Richardson vs. Daggett*, 4 Verm. R., 336; *Draper vs. Jackson*, 16 Mass. R., 480; *Lockwood's Bright's Husband and Wife*, 1, p. 32; *Wms. on Exrs.*, 719.) In the present case, it is urged that the wife, in bequeathing the deposit in question, by describing it as the property of her husband, has attached that character to it. I think not. Those are mere words of description; and in any event the force of a possible inference to be drawn from such a misdescription is neutralized, if not overcome, by the fact she disposes of it in her will, as if it were her own property.

The characteristic features of this transaction are analogous to those of the cases which I have cited. The deposit is in the nature of an investment: the money is not to be preserved *in specie*, but to be employed, and interest thereon paid by the depository. The investment is made with the privity of the husband, in the name of himself and wife; and the certificate of the deposit or investment, is taken in the same names. This was his own act, and establishes a gift to her in case she survived; and he not having recalled it or converted the property into possession in his life-time, and the legal title being in her by survivorship, it is, in the language of Lord Abinger, her "absolute property."

But it is said that at law, gifts from the husband to the wife are void. That relates, however, to direct gifts, not to transactions through the medium of a third person; and, besides, the rule does not prevail in equity, which sup-

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WEIR vs. FITZGERALD.

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ports gifts between husband and wife. (*Lucas vs. Lucas, Ark.*, 271.) There is no claim in this case by creditors, but the struggle is between the representatives of the husband and the legatees of the wife; and I am clearly of opinion that by the mode of investment adopted by the husband, on his decease leaving her surviving, her title to the property was absolute.

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WEIR vs. FITZGERALD.

*In the matter of proving the last Will and Testament of  
JOHN BRINCKLEY, deceased.*

A WILL contested on the ground of incapacity, undue influence, and invalid execution—admitted to probate. Where the testator was of advanced age, his hearing slightly affected, and his sight very seriously impaired, the circumstances attending the execution of his will should be carefully scrutinized for any traces of imposition or artifice. Kind offices and faithful services tend to influence the mind in favor of the party performing them; and care should be taken not to confound the natural action of the human feelings in this respect, with positive dictation and control exercised over the mind of the testator.

The law does not prohibit deaf, dumb, or blind persons from making a will. Defects of the senses do not incapacitate, if the testator possess sufficient mind to perform a valid testamentary act.

The statute does not require a will to be read to the testator in presence of the witnesses, though it is proper to do so when the testator is blind or cannot read.

Besides mere formal proof of execution, something more is necessary to establish the validity of a will when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by the subscribing witnesses, or by evidence *aliunde*.

It is not essential that both witnesses should prove that the provisions of the statute, as to the mode of execution, were complied with. Where one witness testified clearly to their performance, and the recollection of the other was vague and indistinct—held, that the proof of execution was sufficient.

L. R. MARSH, *for Executor.*

I. The requisites of the statute have been complied with in the execution of this will.

1. It was subscribed by the testator at the end of the will.

2. It was subscribed by him in the presence of each of the attesting witnesses, *and* acknowledged to have been so made to each of them.

3. It was at the same time declared by him to be his last will and testament, and

4. There were two attesting witnesses, each of whom signed as such at the request of the testator.

These requisites are evidenced by the attestation clause, as well as by the testimony of the two subscribing witnesses.

II. If it be said that the testator was afflicted with loss of sight, and therefore, greater care was necessary than in other cases. We reply :

1. The statute makes no distinction between a blind man and one who can see. These requisites apply to all—blindness or deafness does not incapacitate. If these requisites of the statute have been substantially complied with, the will is valid, unless otherwise impeached, whether the testator was blind or deaf.

2. The old man could see to some extent. At times better than at others. He could walk the streets unattended ; see when he approached the gutter ; discern forms ; could write his name, and write it well—witness the receipts sworn to by I. W. Gross, and his signature, in 1845, to the bond and affidavit. By his glass he could detect the joints between bricks. He was not so far deficient in vision as to disable him from knowing what was taking place around, at the time of the execution of the will. Nor was any trick or fraud played off upon his sense of sight at that time.

3. Unusual care was adopted by the attorney. Mr. Hopper, who drew this will and officiated at its execution,

## WEIR vs. FITZGERALD.

testified that he drew the will according to *testator's directions*, from a former will ; that he read it over several times to the testator, explaining it to him ; that at the time of execution, he asked him if he declared this which he had just signed, to be his last will and testament, and he said "I do." "Do you desire Mr. Albro, the gentleman present, and myself, to witness your signing and declaration?" and he said, "I do." Then Mr. Hopper told him that a little ceremony was required, and that he should read the attestation clause of the will, which they (the witnesses) were required to sign and certify, and thereupon did read it, and then told him that Mr. Albro and himself would sign it if he desired it, and he said he did ; and the witnesses thereupon signed it.

There was in the execution of this will, a deliberation, a formality, and a full and ceremonious compliance with all the forms of the statute, to an unusual degree and extent, for the very reason, that the testator had not the full benefit of his sight.

4. The decedent was in full possession of his faculties of hearing, and therefore, could well know, unless the will was *fraudulently* read to him, what he was doing.

The evidence on the subject of his hearing, is full and conclusive.

That he was *a little hard of hearing* is obvious ; but that this amounted to any incapacity to do business or make a will, cannot be plausibly contended.

Some of the witnesses observed that he was a little hard of hearing, and others who were on terms of intimacy and daily intercourse with him (Peixotto, contestant's witness, and others), *never noticed any defect* in his hearing at all.

III. It was said on the motion in the nature of a motion for a nonsuit, that the *subscription* must be made in the presence of two witnesses, and at the testator's request. We reply :

1. This is *not* necessary. The statute does not require

## WEIR vs. FITZGERALD.

it. It may be either so subscribed *or acknowledged*—§ 32, *subd.* 2.

2. It was, in fact, subscribed in the presence of the two witnesses, who witnessed at request of testator.

*Hopper* swears that this was so, and gives his account with great minuteness.

*Albro* swears that his impression is that he saw the testator sign the will, and he should have thought it singular if he did not.

3. It is not necessary that both witnesses should *remember* all the requisites, especially when one of them does distinctly remember them.

If the witnesses are dead or absent, it is enough to prove their signature. The will in such case is admitted to probate without any proof of the recollection of the witnesses.

So, *it is held*, that when it is stated in the attestation clause, that the requirements of the statute have been complied with, specifying them, *the mere want of recollection of the witnesses*, is not evidence of non-compliance. It will be presumed that the witnesses would not have signed a false statement; and the will must be regarded as duly proved, unless *affirmative proof* of non-compliance is introduced. (26 *Wendell*, 325, *Remsen vs. Brinckerhoff*.) No such affirmative proof is offered in this case.

IV. It was stated on said motion as for nonsuit, that the will must be *declared* by the testator to be his last will and testament, in the presence of the two witnesses. We answer:

1. It was so declared.

*Mr. Hopper* swears to it most unequivocally.

The attestation clause states it so, and it is not necessary, therefore, that *Albro* should remember it. It will be so held, under the authority last cited, unless *affirmative proof* to the contrary is given.

But *Mr. Albro* says that *Hopper* asked testator if he

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WEIR vs. FITZGERALD.

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declared this to be his last will and testament, and the testator assented, nodding his head.

This, of itself, was a sufficient declaration.

Such *declaration* need not be in any form of words. "To declare to a witness that the instrument subscribed was the testator's will, must mean, to make it at the time distinctly known to him by some assertion, or by clear assent in words or signs." (26 *Wendell*, 336, *Remsen vs. Brinckerhoff*.)

V. The idea that the testator could not make a valid will from defect of mind or memory, seems wholly lost under the overwhelming evidence from the witnesses on both sides on the subject.

The pretence of the contestants was not, that there was any tendency to *insanity*. It has not been intimated that it would be contended that there was any mental aberration.

The idea put forth by contestants' counsel seems to be, that advancing years and affliction in his sight, had weakened the vigor of the testator's mind and impaired his memory. As to this, we reply:

1. That the evidence is conclusive, that Mr. Brinckley's mind *was firm and sound, and his memory good*.

Even on the contestants' own evidence, this is clear.

*McCord* says he talked understandingly, not incoherently, but like a man of sound mind.

*Peixotto* says his memory was fair, and his mind was firm.

*Rynex* thinks his mind was weakened by his having *sore eyes!*

So far from any affliction in the eyes having a tendency to impair the mind or memory, the effect of it is directly the reverse. A man unable to use his eyes is more in the habit of trusting to his memory, which improves under the additional confidence thus reposed in it. Instances of this, I doubt not, will occur to every man within the circle of his own acquaintance.

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WEIR vs. FITZGERALD.

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*Christopher*—Never noticed any defect in his mind or memory ; talked reasonably two or three days before his death.

*Miss Gross* says his mind was *sound*.

*Edward Gross*—Never observed any signs in him of age, decay, or impaired intellect.

This is the evidence with which the contestants come into the field.

We call *Dr. Ogden*. He saw no indications of derangement or imbecility, or debilitated mind.

*Wheeler* never observed any signs of giving way in his mind—perfectly rational, and so up to the time of the accident.

*Betts* worked for him and talked with him, and saw nothing to excite suspicion.

*Martin*—His mind was *firm and strong*—sound intellect—and intelligent.

*Harding*—His mind very sound and very acute, never perceived any weakness or loss of memory.

*Haviland*—Mind good as usual for that time of life.

*Margaret Gamble*—The testator used to visit her in her blindness, and afford his assistance ; and, as she could not read, would repeat to her whole chapters in different parts of the Bible.

Can the learned counsel for the contestants furnish the same evidence of their capacity to make a will, in benevolence of mind and tenacity of memory, as the testimony of Margaret Gamble shows to have been possessed by Mr. Brinckley ?

And all agree that his *health was good*, his habits regular, and his exercise systematic. Such a man is not likely, at the age of 76, to have his intellect flicker dimly in its socket.

It appears he had mind enough to *gather* a handsome estate, and, what requires equal prudence and care, to *keep it, too*.

2. But it is not indispensable to the capacity to make a

## WEIR vs. FITZGERALD.

valid will, that the mind should retain its original strength, or be a mind of strength.

The testator may not be capable of managing his own business—he may tread on the confines of idiocy itself—yet, if he be *not an idiot*, his right to make a will is not impaired.

“Imbecility of mind in a testator, will not avoid his last will and testament. Idiots, lunatics, and persons *non compos mentis*, are disabled from disposing of their own property by will; but every person not embraced within either of the above classes, of lawful age, and not under coverture, is competent to make a will, *be his understanding ever so weak*. Courts, in passing upon the validity of a will, do not measure the extent of the understanding of the testator, *if he be not totally deprived of reason*; whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions.”

“A man’s capacity may be perfect to dispose of property *by will*, yet inadequate for the management of other business; as, for instance, to make contracts for the purchase and sale of property; and therefore a court of chancery may commit the property of a person *incapable of managing his estate* to the charge of a committee, and yet, after his death give effect to a will made by him whilst laboring under such incapacity.” (26 *Wendell*, 255, *Stewart’s Ex’rs. vs. Lispenard*; confirmed in 3 *Denio*, 37, *Blanchard vs. Nestle*.)

VI. The great cause of objection seems to be, that the testator has seen fit to give a large share of his property to his nephew, Dr. James Weir.

Well, this he had a right to do. (9 *Cow.*, 208, *Jackson vs. Betts*; 2 *Hill*, 570, *Germond vs. Jones*.)

But if it is contended that *undue influence* was used to induce this bequest. We reply:

1. The case lacks *all evidence whatever* of any *undue*

## WEIR vs. FITZGERALD.

*influence.* On the contrary, the contestants prove, by Peixotto, that he knew of *no* fact indicating that Weir had any control over the testator's mind.

This is a somewhat conclusive answer to the objection.

2. The testator was not a man likely to be *unduly influenced.*

That his mind was good and firm, is abundantly established; and the contestants themselves prove, by Peixotto, that it was *independent.*

3. There is no evidence whatever that Weir ever requested the testator to remember him in his bequests, or made any suggestion as to any of the provisions of his will. On the contrary, it appears by the testimony of Wm. Hopper that the testator *himself, alone*, directed how it should be drawn.

4. But if he had solicited such testamentary remembrance, and urged it by fair persuasion, it would not invalidate the will.

One has a right, by fair argument or persuasion, to induce another to make a will in his favor. (3 *Denio, R.*, 37, *Blanchard vs. Nestle*; 3 *Serg. & Rawle*, 269, *Miller vs. Miller.*)

5. But in this case there was every good reason why the testator should devise a liberal share of his fortune to Mr. Weir.

Mr. Brinckley had neither wife nor child. In giving his property to his nephew, he disregarded no one who had any claims upon him. He violated no promptings of natural affection or claims of blood. Mr. Weir had been kind and attentive to him for many years. He made Weir's store his place of habitual resort. It gave him pleasure to visit Weir and his family. He always found there friends and a home. He had taken an interest in his nephew's education and advancement. He bestowed on Weir the affection he would have given to his own child. When Weir was sick, the old man was anxious and alarmed. Weir returned his good offices and kindness, was always ready

## WEIR vs. FITZGERALD.

to aid him, and for years assisted him in the management of his affairs.

If these contestants ever helped the old man over a gutter, or lifted a finger to aid him, or spoke a kind word to console him—or did any act whatever to smooth his descending journey, the evidence of it exists elsewhere than in this case.

That Mr. Brinckley should have felt attached to Weir, and been moved by gratitude for his long and continuous kindness, care and assistance, was not only natural, but one of the strongest evidences of a sound and healthy mind.

These very qualities, attachment and gratitude to a donee for long and persevering care and kindness, are recognized, in the great case of *Stewart vs. Lispenard*, as one of the evidences of capacity to make a will. (26 *Wend.*, 255, 3d marginal note.)

VII. The provisions of the will itself, furnish evidence on all the foregoing points upon the merits. They seem just and equitable, neglecting no one, taking care of all; and yet, with a just discrimination, not unmindful of the obligations of gratitude, or the promptings of affection.

E. W. MARSH, for C. M. Sneedon.

I. The *onus probandi* lies in every case upon the party propounding the will, and he must satisfy the court that the instrument so propounded is the last will of a capable testator. (*Barry vs. Butlin*, 1 *Curteis, Ec. R.*, 638; *Chaffee vs. The Baptist Missionary Convention*, 10 *Paige*, 86, 90, 91.)

II. The law in this country does not *favor* wills; on the contrary, the courts are disposed to construe the statute of wills strictly. The Supreme Court of Pennsylvania says the statute of wills should be strictly construed, and adds, "It is infinitely better, especially when, as in this country, the law makes an equal and just distribution of the estate, that

## WEIR vs. FITZGERALD

a person should die intestate, than that we should run the risk of fraud and mistake, which will be the inevitable consequence of a loose construction of the act. (*Beckly Will*, 9 *Barr's Penn.*, R. p. 58; 1 *Denio*, 33; 8 *Paige*, 491; 26 *Wend.*, 325.)

III. The position of the principal witness, Hopper, is not such as to demand implicit and unqualified credit.

1. His want of candor. It does not appear until the *fig-end* of a long cross-examination that he was testifying to the will of a blind man *who told him he could not see to read*, who could not recognize him by sight. Still, he swears, in his direct examination, that Brinckley *saw* them witness the will.

2. His want of recollection. He cannot recollect the contents of the old will, or of the new will, or any of the alterations.

He cannot recollect in what room the will was executed, or who was present, or any of the attendant circumstances. His testimony is professional.

3. He is contradicted by Albro and Peixotto on material points.

Albro contradicts him as to the alleged conversations which are said to have taken place at the time of the execution of the will; and Peixotto, as to his intimacy with James Weir, and as to his conversation with him, and his delivery of the will to him.

IV. Each witness should at the time of the execution of the will, be able to testify to all the requirements of the statute. (1 *Denio*, 33.)

1. Albro swears positively, that he did not see the testator sign the will, and heard nothing about signing. This is not a case of want of recollection.

2. Mere presence of the witness in the room without knowledge in his part of what is going on, is clearly not sufficient to make a good execution. (*English Law and Equity Rep.*, vol. 2, p. 594, *Noding vs. Alliston*.)

## WEIR vs. FITZGERALD.

3. Albro swears positively, that the testator never requested him to witness the will. Hopper swears that after consulting with Brinckley, Weir went for the witness Albro. But what was said at the consultation does not appear. Hopper, perhaps, swears to conversations after Albro arrived, from which a request might be inferred. But he is contradicted by Albro, who swears that he did not see the old man's lips move, and did not hear him say a word.

V. A declaration made by a blind man, under such circumstances that he could not by any possibility be cognizant of the truth of what he was saying, is no declaration within the meaning of the statute, and does not satisfy the 3d subdivision of the 40th section of the statute.

1. A declaration of a blind man as to matters of vision, or of a deaf man as to matters of hearing, is no declaration.

2. The testator at the time of making the declaration, must be able to identify the instrument, and must identify it.

It would not be a sufficient declaration if the testator should declare he had executed a will, if the will was absent, and was not in some way identified *by the testator*.

So if the will is present, and the testator is incapable of identifying it, the declaration is good for nothing and a mere idle, unmeaning ceremony.

VI. The testator being blind, the witnesses could not be said to sign in his presence, any more than though they had been in different rooms.

1. To constitute presence, it is necessary not only that the testator be corporeally present, but that he be mentally capable of recognizing and be actually conscious of the act performed before him. If his view of the proceeding is necessarily obstructed, the mere proximity of the places of his signature and their attestation, will not suffice, even though it were in the same apartment. (*Greenleaf, Evidence, Vol. 2, § 678; In re Colman, 3 Curt., 118.*)

## WEIR vs. FITZGERALD.

VII. There can be no intendments in the case of a blind testator.

On proof of the signature of the testator, it will ordinarily be presumed that he knew the contents of the will. But this presumption may be repelled by proof of any circumstance of an opposite nature, such as his ignorance, sickness, state of mind or the like,—the inconsistency of its provisions with his obvious duty or known affections,—or the character or interests of the persons who wrote the instrument. (*Greenleaf, Evidence, Vol. 2, § 678; Ingram vs. Wyatt, 1 Hagg, Ec. R. 384; Park vs. Olatt, 2 Phillim, Ec. R., p. 324; Darling vs. Loveland, 2 Curt., 226.*

VIII. The will was executed under circumstances calculated to throw strong suspicion upon it. The testator 74 years old, blind, the will executed away from home in a drug store, his confidential agent and residuary legatee the principal actor, his attorney the principal witness, no change in the circumstances of the testator's family to require a change in the will, the evident secrecy with which every thing was done, the large share of the property willed to the agent, his evident influence by reason of his confidential relations, every thing being prepared when the lawyer came to see him, *and the evident prostration of the testator at the time of the execution of the will*,—all throw a strong suspicion upon the transaction.

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DANIEL GARDNER, for D. A. Fitzgerald.

I. The *onus probandi* of every material fact—double or at least by two witnesses, each swearing independently to the necessary facts—lies with the party offering the will for probate. This James Weir has failed to do. (*2 R. St., 1st ed., p. 63; 2 ed., p. 7 § 40; Cavett's Appeal, 8 Watts & Serg., 21, 25, 26; 8 Paige, 491, 7, 8, 9, 501, 2; 1 Curteis, Ec. R., 127; 26 Wend., 325, 333, 6, 7; 1 Denio,*

## WEIR vs. FITZGERALD.

*R.*, 33, 4; 10 *Paige*, 86, 90, 91; 1 *Hoffman*, *Ch. R.*, 1, 2, 4, 5; *Ellis Will*, 2 *Curteis*, *Ec. R.*, 395.)

The will ought to be refused probate, because not read to the blind old man in the presence of two witnesses. (10 *Paige*, *Ch. R.*, 90; 1 *Curteis*, *R.*, 137, 125, 128; 2 *Haggar's Ec. R.*, 189.)

The civil law required the reading of a will to a man who could not read, in presence of seven witnesses and a notary. (*See Domat*, *Boston ed. of 1850*, Vol. 2, 302, Art. 20.)

II. The testator's capacity to make a will is not *prima facie* proved by the two witnesses to the will, and it is upon the whole proof disproved or rendered doubtful; and this is fatal to the will. (1 *Paige*, *Ch. R.*, 171, 173, 4, 5, 6, 7, 8; 3 *Comstock*, 498, 9, 500. *See Revisers' notes to Revised St., on Wills*; *McTaggart vs. Thompson*, 14 *Penn. Rep.*, p. 154; 1 *Beck's Med. Jurisp.*, 718, tit. *Dementia*. 1 *Id.*, p. 752, *Id.*, 821.

III. Two witnesses do not prove that they either saw the signing of the will, or that the testator acknowledged the signature to them severally, as his witnesses. This is fatal to the will. *Lewis' Will*, decided by Surrogate of Kings County, New York. (*Legal Observer*, Vol. 9, p. 150, 4, 5.) See also, above authorities.

IV. The testator did not request the two witnesses to sign the will in attestation of his signature and of his publication of the paper as his will. This is fatal to the will. *Albro* never saw the signature of *Mr. Brinckley* at the execution. *Mr. Brinckley* did not see, nor could he see, the witnesses sign the will as witnesses, as he was so blind; so there was no mental presence to the act. (1 *Barbour*, *S. C. R.*, 530; 1 *Douglas*, *R.*, 241, 314; 4 *Kent's Comm.*, 6th ed., 515; 11 *Iredell's N. Carl. R.*, 637.)

V. The testator did not declare the paper to the two witnesses to be his will, and request them severally to attest it; and this is fatal to the will. (*Id.*)

VI. The will is manifestly the will of James Weir, effected by Hopper, the witness, and by him, Weir; and this is fatal to the will. (1 *Paige*, 171, 172, 4, 5, 6; *Mynn vs. Robinson*, 2 *Haggard's Ecclesiastical Rep.*, pp. 185, 6, 188, 9, 190, 1, 9, 202, 204, 205; 2 *Moore, Privy Council R.*, 317, 319, 320, 322, 4; *S. C.*, 1 *Curteis, Ec. R.*, 125, 6, 137.)

VII. Especially, the will is void having been procured by Weir, the general agent of the blind man, and his nephew. (3 *Wend. R.*, 629, 630; 4 *Edward's Ch. R.*, 44; 5 *Paige, Ch.*, 650, 6; 4 *Howard's U. S. R.*, 544, 555, 567; 8 *How. U. S. R.*, 183.)

VIII. In the case of Beckly's Will (9th *Barr's Penn. Rep.* 58), decided in 1848, the year of Brinckley's supposed will, it was decided by the Supreme Court of Pennsylvania, that the statute of *wills should be strictly construed*; and the court add, it "is infinitely better, especially when, as in this country, the law makes an equal and just distribution of the estate, that a person should die intestate than that we should *run the risk of fraud and mistakes*, which will be *the inevitable consequence of a loose construction of the act.*" [*See 5 Barr's R.*, 33.]

Our Revisers, in their report on the New York Statute of Wills, say their object was "To *prescribe distinctly the mode of executing wills,*" &c.

IX. The ordinary principles of the civil law are adopted into our law, that two witnesses are necessary in relation to wills. (*Domat's Civil Law*, by *Strahan, Cushing's ed. of 1850, Vol. 1, p. 813, § 13.*) See also, the authorities on the first point.

## WEIR vs. FITZGERALD.

X. When the lawyer is employed to draw the will by the party to be benefited by the will, and is the main witness to prove the will, the court is bound to exercise a vigilant suspicion as to the will and its execution, and must refuse probate unless strict proof is given that the testator was capable of understanding the will, and really understood it, and meant it of his or her own volition. (1 *Curteis, Ec. Rep.*, 125, 8; *Same case on appeal*, 2 *Moore, Privy Council Rep.*, 319, 320, 4; 2 *Haggard's Ec. Rep.*, 185, 6, 8, 9, 190, 1, 9, 202, 4; 1 *Id.*, 60, 68.)

XI. In judging of the sanity and capacity of the testator, the court itself is to judge, from the appearance, words and actions of the testator at the time of executing the will (1 *Beck's Med. Jur.*, p. 752, 718, 821), and from facts proved, whether he was of sound and disposing mind and memory, and whether he really understood the will; the mere opinions of the witnesses not being evidence. (See cases cited to 2nd point; 3 *Wash. Cir. Court Rep.*, 580; 4 *Wash. Cir. Court Rep.*, 268; *Coxe's U. S. Digest, Title Wills.*)

XII. The will was obtained by Weir and Hopper by fraud and management. (1 *Curteis*, 171; 2 *Haggard's R.*, 189.)

XIII. Its signing by John Brinckley is disproved by the weight of evidence, and its legal execution by him is not proved.

Albro contradicts Hopper as to his, Albro's, being present at the signing; and Gross disproves the handwriting of Mr. Brinckley.

XIV. Probate ought to be denied with costs. (2 *Haggard's Ec. Rep.*, 209.)

The above objections are taken against the probate of the paper propounded by James Weir as John Brinckley's

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WEIR vs. FITZGERALD.

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will, and on behalf of Mrs. Sneed and Mrs. Fitzgerald, two nieces of said Brinckley.

THE SURREGATE. The decedent at the time of his death was 76 years of age. His wife died in 1847, and he had no kin nearer than nephews and nieces. The will propounded for proof, bears date April 28, 1848, and was prepared in a measure from a previous will, executed some three or four years before. It does not appear what the alterations were, though it is not unlikely that the decease of his wife may have occasioned some change in his testamentary intentions. Both these instruments were drawn under instructions, given by the decedent personally to the counsel who prepared them. The probate is contested on the grounds of incapacity, undue influence, and non-compliance with the statutory ceremonies requisite to the valid execution of a will.

Total incapacity is not alleged, but it is urged that his mind and memory were so impaired as to make him the subject of undue influence. In judging of his mental condition, it is important to bear in remembrance, that his hearing was slightly affected, and his eyesight very seriously impaired. But two witnesses express an unfavorable opinion of his competency. Mr. McCord, who knew him for eight or ten years, and for two years succeeding May 1, 1848, was in the habit of seeing and conversing with him several times a week, from his intercourse with him during the latter period says, "I should think he was not capable of attending to business. I should not think he had sufficient intellect to make a contract." "I should judge his memory was very treacherous. He seldom if ever could recognize my voice, though I was in the habit of going in there so often. I generally had to tell him who I was before we commenced conversation." "I could not say I could consider him capable of making a will. I should say if he had bequeathed his property one day, he

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WEIR vs. FITZGERALD.

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could not say the next day how he had distributed it. He might come near to it—he might recollect perhaps the principal bequests he had made, but not accurately. I think it would require a good deal of teaching and instructing, in order for him to make a proper will. I do not think he would know how to estimate the value of his property. I think his mind in 1848, was as feeble as it ever has been. I think he could understand as to his family, and the relations the different members of it bore to him.” The witness also expresses the opinion that the decedent had not sufficient capacity to rent his houses, or know the value of rents and of property; and that this arose not so much from want of information as from want of a retentive memory; that his memory was stronger as to matters of remote than as to those of recent date; and he particularizes an instance in 1848 or 1849, in regard to a lawsuit, when his loss of memory indicated itself in a repetition of inquiries at different times, relative to information previously given which he seemed to have forgotten. On cross-examination, Mr. McCord states that although the decedent was indisposed to start subjects of conversation, he talked “understandingly” and “very well” on “usual topics.” He also adds, “His mind was not all gone; he did not talk incoherently; he talked like a man of sound mind; he seemed deficient in memory and recognition; I could not say there was any other trait or faculty of mind in which he seemed deficient. I do not think the defect or loss of memory was total. He could recognize a person after being told who the person was, who was present. He did not, that I am aware of, forget the names of his near relatives; but he would forget the names of distant relatives, and ask the names. On one or two occasions, he would ask the names of his niece’s children, Eliza Acker.” “He was reputed to be worth about \$50,000. I think he would generally have his own way, except that in business matters, he would always refer me, and others so far as I knew,

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WEIR vs. FITZGERALD.

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to Mr. Weir." "I don't know any fact indicating any control of Mr. Weir over the mind of the decedent."

Mr. Rynex, who was acquainted with the decedent ten or twelve years, and visited him occasionally at his house, about the commencement of the year 1848, some two or three times a week, says, "I considered his mind as rather imbecile, indeed, quite so. I judged he had suffered very much with his eyes, and he was very hard of hearing; and I considered his suffering from these difficulties had enfeebled his mind." "I did not think him competent to make a will in 1848." "I talked with decedent quite often on various subjects of conversation. He would reply to me very well. He often asked me to tell him the same thing over again; and I would do so again and again, till I could get him to understand what I said. I suppose he understood, for he gave assent to it. I never talked to him on business, or had business transactions with him. I thought him incompetent to make a will, in consequence of the complaints he made about his extreme suffering, and the difficulty I had to make him understand very simple accounts I gave him of passing events." "I cannot say what the cause was of the difficulty I had to make him understand; I judged it was from his mind being affected by his sufferings."

This is the burden of the evidence tending to impeach the capacity of the deceased; and, under the established rules applicable to the subject, it is obviously insufficient to sustain absolute testamentary incompetency. There was nothing like a total deprivation or loss of reason or memory. Whatever doubts this testimony may have suggested must, however, be removed by the evidence not only of the witnesses produced by the executor, but of many who were examined on the part of the contestants.

Miss Gross, a witness for the contestants, who resided in the upper part of the house where Mr. Brinckley lived since 1820, says upon direct examination, "I think as he grew old, his mind became somewhat enfeebled. I don't know but I noticed a failure in his memory; I don't know

## WEIR vs. FITZGERALD.

in what particular, but I think in some instances I have noticed it." On cross-examination, she states: "I don't recollect any instances now of the failure of his memory, but I have at the time noticed some, I suppose in the course of the last three years, or perhaps *later*." "I was in the habit, two or three years ago, of conversing with him; we would talk about different things; he would answer and talk as though he understood. I think his mind was pretty good, but I think his mind and his hearing failed with his age; I cannot say to a greater extent than is usual." "He forgot I paid rent to him, once, about a year ago." "*Three years ago this spring, in 1848, I should think his mind was sound, allowing, of course, for his age; I don't know but what his memory was then pretty good; I don't know that I had up to that time observed any failure in his mind, very particular.*"

Mr. Gross, a witness for the contestants, who knew the decedent for thirty years, and was intimate with him, says his mind "Was about as that of a man of his age should be with his infirmities. *I cannot say that I ever observed any signs of imbecility or of a decayed or impaired intellect.*" "*I can't say that he was a man likely to be influenced by those who dealt with him.*"

Mr. Christophe, a witness for the contestants, an old acquaintance, who saw him occasionally in 1848, says, "*I can't say I ever noticed any defect in his memory.* Sometimes he could recognize me by my voice, at others he would not; I observed he was a little hard of hearing; I frequently had to repeat a thing over to him several times; I should think he was capable of making a will; he had pretty fair abilities; when he was left to himself, I think he could make a pretty fair kind of a will; I thought he might be easily influenced; he did not seem to have much mind of his own lately, I thought; James Weir did his business." "I did not observe any change in him, much, myself, lately; but I had not much intercourse with him latterly. The last time I saw him, was less than two or

## WEIR vs. FITZGERALD.

three months before his death. He talked then very reasonably."

Mr. Peixotto, a witness for the contestants and a clerk in James Weir's store, states that the decedent was in the habit of calling there every fair day, when he was well, except in the summer season. He says: "*I should think decedent had a fair memory*, I should judge so from his conversation; I would read the paper to him and often heard him tell of things that had happened—frequently he would spin yarns and relate incidents of previous life." He "appeared to understand me as I read the newspaper to him; he paid attention; I took pleasure in reading to him; he seemed always pleased, I judged so from his conversation; he conversed upon the subjects I read about, as if he understood them; the state of his mind, as to soundness, was fair." "I should judge he had capacity enough to understand a contract at the time it was made; I would not say he would remember it five years after; but at the time it was made I should judge he had sufficient mind to understand everything that was said about it." "I do not think his memory was so impaired that he would forget in a day or two; he might in a longer time; if it was anything *important*, I think he *could* recollect it a good while. I do not think he ever requested any transaction to be restated; I would sometimes read part of an article to him one day, and part the next; I would say, 'You remember what I said yesterday?' and he would answer 'Yes,' and then I would go on."

Dr. Ogden, a witness for the proponent and an old acquaintance of the decedent, states that he saw and conversed with him at James Weir's house two years since, on the occasion of Weir's sickness. He says, "He appeared to have his faculties, so far as I saw; there was no indication of any derangement or imbecility—not more than in persons generally of his age." The doctor mentioned some peculiarities, and adds, "When I saw him at Wier's, I did not observe in what he said, any indication of im-

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WEIR vs. FITZGERALD.

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paired or debilitated mind, but I thought the peculiarities I have spoken of had grown upon him by the effect of age."

Margaret Gambel, a blind woman, acquainted with the decedent for a long time, and visited by him in late years once or twice a week, states that his memory was excellent, and illustrates her opinion by the fact that he was in the habit of repeating to her passages and entire chapters in the New Testament. She speaks in unqualified terms of the soundness of his mind.

Mr. Haviland, who had known him from boyhood, and met and conversed with him frequently in the last four or five years, thinks his mind was as good as that of people at his age, generally.

Mr. Harding, whose step-mother was the wife of the decedent, and who had abundant and excellent opportunities of forming a correct judgment as to his capacity, says, "*I thought his mind was very sound and very acute. I don't think I ever perceived any failure in his mind, or any weakness or loss of memory.*"

Mr. Martin, who had known him for more than thirty years, and frequently saw and talked with him, says, "*I always took his mind to be firm and strong. It was the same as any other man's could be. He was in his right mind. That was so while I did the last work for him (in 1850.) I never found any difference. I thought he was very good as to intelligence. He was a man of sound intellect on every subject he conversed about.*"

Mr. Betts, who worked for the decedent, states that he gave directions in regard to the work, was inquisitive and attentive, and he saw nothing to excite any question as to his capacity.

Mr. Wheeler knew the decedent intimately for fifty years. He says, "He was a very retiring, excellent man. I had frequent conversations with him, and always found him rational—in his senses. The chief subject of our conversation was religion." "*He was as rational a man as*

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WEIR vs. FITZGERALD.

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*any man in this room: that I am positive of.* I never observed any weakness of mind, or that his intellect was giving way in the least."

The force of all this evidence in favor of the capacity of the decedent is, I think, increased, when we reflect upon his physical condition, and his peculiarities of deportment. The loss of distinct vision, very naturally tends to withdraw, as it were, the mind within itself. The necessity of depending entirely upon the memory would, it is true, lead to the preservation of that faculty, but likewise to greater care in precisely understanding what was said to him, an anxiety which might very readily, in connection with some slight defect in his hearing, induce a request to have matters he was desirous of comprehending, repeated to him. The chief avenue to his mind was through a single sense. Dr. Ogden describes him as a man who "pondered before he spoke"—rather "still and quiet;" and the general tenor of the evidence indicates that, although intelligent enough in conversation, he was not suggestive in starting topics. I see nothing remarkable in that. It would have been singular if the reverse had been the case. In regard to his hearing, the weight of evidence shows it was very slightly affected, and required, from a person speaking near him, only a clear and distinct voice, perhaps a little above the usual tone. The very witness who gave the most adverse opinion on this point, stating that he "considered him a very deaf man," said also, "He could hear pretty well if you talked to him in the tone of voice I am using on this examination. That is the tone in which I usually conversed with him. I think it is above the ordinary tone."

He certainly was not totally blind. His vision had become impaired in early life, when engaged in watch-making, and grew worse with his declining years. But he was in the daily habit of walking the streets—he attended church and visited his friends—all without a guide. The accidents that happened to him, one of which occasioned his death, prove that he could not do this with impunity ;

## WEIR vs. FITZGERALD.

and yet his general habit establishes a considerable degree of visual faculty. There can be no doubt that he could perceive forms, but probably not to such an extent as to recognize persons without the aid of the voice. It is the most ordinary thing in the world, for persons whose sight is defective, to have the power of perceiving a form without the faculty of distinguishing persons. It happens constantly, beyond a certain range of vision, with near-sighted persons. Although, as stated by one of the witnesses, the decedent could not *distinguish* one written instrument from another two feet off, yet he may very well have been able to *perceive* a written instrument at that distance. McCord says, "I don't think he could possibly see to distinguish one letter from another—that is, ordinary writing or printing. He might very large letters, perhaps." Mr. Peixotto says, "I should not think the decedent could distinguish countenances at arm's-length, any time in 1848." "I do not think he could have seen his own signature, if he had signed it." Mrs. Gross says she does not think that, "for the last ten years, he could distinguish a person at arm's-length." Mr. Martin says, "He could see, I think, his own hand, when he held it up. He could discern a brick, and the joint of bricks, in looking at it with a glass which he carried—a pocket-glass. He could see forms by getting close. He could see gutter-stones, so as to step over and upon the curb." Mr. Harding says, "Two years ago, I think, he could distinguish a form before him." Margaret Gambel states that, standing by the window of her front room, he observed some flowers by the back-room window.

I am satisfied the decedent was perfectly competent to make a will; but in view of his condition and infirmities, the transaction should be carefully examined for any trace of imposition or artifice. Mr. Weir was his agent, and stood in a confidential relation. The will was prepared through the intervention of counsel with whom he was acquainted, and called in by him. This was the natural

## WEIR vs. FITZGERALD.

channel in which the business would be done; but we must look to see if advantage was taken of this circumstance. It seems that the largest portion of the property is given to Weir; still there is no indication of this being inconsistent with the state of the decedent's affections. Weir, it appears, had been brought up by his uncle, and for several years had been entrusted with the management of his business. Brinckley was in the habit of daily visiting his store, unless prevented by ill health or bad weather, and was interested in him. I cannot say, under all the circumstances, that the provisions of the will are unreasonably partial. The decedent gives to his sister-in-law, Mary Brinckley, an annuity of \$180, and to his niece, Mary C. Stevens, an annuity of \$120,—which he charges upon one of the houses and lots devised to James Weir. He then gives, in legacies, over sixteen thousand dollars, as follows: To the Missionary Society of the Methodist Episcopal Church, \$1,000; Robert W. Weir, \$2,000; John B. Weir, \$2,000; William H. Weir, \$1,000; James Weir, \$2,000; Charlotte A. Weir, \$3,000; Mary Ann, the wife of James Weir, \$1,000; William Weir, \$1,000; Caroline M. Sneed, \$1,000; Adeline O. Sammis, \$1,000; Delia A. Fitzgerald, \$1,000; and to seven of the children of his deceased niece, Eliza Acker, \$100 each. The residue is given to James Weir, with instructions, after an allowance to him of \$350 per annum, as acting executor, to invest it, and apply such part of the income, as the executors should, in their discretion consider necessary, to the relief of the persons named in the will, as they might require assistance by reason of being in necessitous circumstances. Thus, none of the decedent's kin appear to be forgotten, and the legacies are substantial. There is a large number interested in the provisions, besides James Weir; and the only parties contesting are Mrs. Sneed and Mrs. Fitzgerald.

But it is proper to consider the manner in which the will was prepared. Mr. Hopper, who drew it, states that it was drawn, in a measure, from a former will, which he

## WEIR vs. FITZGERALD.

had drawn, and which was handed to him by the decedent. He says, "The alterations between this will and that will were made at his suggestion. I drew this will pursuant to his instructions." "I made some pencil memoranda on the old will, in respect to the alterations the decedent wished to make." "As the decedent dictated the alterations he wished, I made a minute of them." "He told me what alterations he had made; and in regard to one bequest, he gave me the reasons for it. That was the bequest to James Weir. He said that James had been very kind and attentive to him, for a long time; that he had the charge of his business for a considerable time, and he felt very grateful to him, and that was his reason for making a difference in his favor." The witness met Mr. Brinckley at Weir's store, and received his instructions there. After it was drawn, he delivered it to him, together with the old will, at the same place. This was the day before the execution. At that time he read the will to him. He says, "I read it to him two or three times. I recollect, I read it so often, and he was so particular in his inquiries—it got so late—I told him I could not wait to have it executed that afternoon, and would leave it with him. No one was present at this conversation; I am very sure no one was present. Whenever I went there about the will, we were always alone; I am confident when conversing about the will, we were alone. I read the whole will to him, in a very slow and distinct manner, going over the passages in a way that he heard me—that is, he appeared to. I read the old will, and then paused where the alterations were made, and showed him the alterations. I did not read the whole of the old will, but only such passages as he wished to have altered. I read the second will over to him the day it was executed, once or twice. I went over some parts of it again. I had as much trouble as I had the day before, in reading it to him, he was so particular. He said he had great difficulty in reading, and he wanted to remember it. There were no particular

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WEIR vs. FITZGERALD.

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explanations the second day. I read it very distinctly indeed. It was in a voice loud enough for him to hear. I recollect it was louder than my usual tone. I found I had to do so. He would insist upon my reading very slowly and distinctly. From his requesting me to read slower, and read over again, I got the impression he did not hear very well, though I did not know he was deaf. He would say to me, 'a little louder,' and 'a little slower.' I do not remember what was the precise tone of my voice, whether the same as I now use or not." It thus appears there was abundant care and deliberation in the preparation of the will, the ascertainment of the intentions of the decedent, and the explanation and reading of the document when drawn. When the decedent gave the instructions, Mr. Hopper spent an "hour or two" with him; when the will was read the day previous to the execution, some considerable time must have been consumed; and on the day of the execution, over half an hour was occupied in the same way. Nor is there any proof of any interference on the part of Mr. Weir in regard to the provisions of the will. He knew of its execution, and, probably, of the proposed alterations from the former will; but there is nothing in the case from which to infer any direct management or influence exerted to bring about these changes. Kind offices and faithful services, in ordinary course tend to influence the mind in favor of the party thus acting; and care should be taken not to confound the natural action of the human feelings in this respect, with positive dictation and control exercised over the mind of the testator. There is no trace of any such fraud, dictation, or control in this case; and I cannot infer the existence of artifice or undue influence, merely from the favorable bequests to James Weir, especially in view of the emanation of instructions from the deceased, and the proof that the will accorded with his wishes and intentions.

It is contended, however, that the will was not executed in conformity with the directions of the statute. By the

Roman law, no person could make a valid will who lacked some of the principal senses—such, for example, as were deaf and dumb, or blind. Blackstone lays this down of those born deaf, dumb, and blind, who, he says, “as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.” (2 *Com.*, 497.) The rule was, of necessity, qualified by the reason of it, which was a presumed want of capacity. Persons born deaf and dumb could not make wills, on the supposition of insufficient capacity: *Surdus, mutus, testamentum facere non possunt.* (*Dig.*, L. XXVIII, *Tit.* 1, §§ 6, 7); but subsequently it was allowed where the defects were not congenital, and there existed sufficient testamentary capacity. (*Cod.*, *Lib.* VI., *Tit.* 22, § 10.) A blind man might make a nuncupative will, by declaring the same before seven witnesses; but he could not make a testament in writing, unless it was read to him and acknowledged by him to be his will before the witnesses. (*Cod.*, *Lib.* VI., *Tit.* 22, § 8; *Inst.*, *Lib.* II, *Tit.* XII, § 3, 4; *Dig.*, *Lib.*, XXXVII., *Tit.* 3.) This was first permitted by a decree of Justin, and continued to be the rule of the civil law. *Cæcus, autem, non potest facere testamentum, nisi per observationem, quam lex divi Justiniani, patris nostri, introduxit.* It has not, however, prevailed in England, nor been incorporated in any of the statutes relative to wills. The object of requiring the will to be read to the blind man was doubtless to prevent fraud, the substitution of one instrument for another, and to secure evidence, beyond the mere *factum* of the will, of the knowledge of the contents of the identical will by the testator. It has not been made a formal ceremonial by our statute, in any case, that the will should be read to the testator in the presence of the witnesses, though it is eminently proper so to do where the testator is blind or cannot read. The statute is satisfied by the subscription of the testator, at the end of the will, in the presence of two witnesses, or the acknowledgment of such subscription; the testamentary declaration of the testator;

## WEIR vs. FITZGERALD.

and the signature by the witnesses, of their names at the end of the will, at the request of the testator. These forms are necessary, but, even when satisfied by the evidence, do not always entitle the will to be admitted to proof. Something more is necessary to establish the validity of the will, in cases where, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is therefore required that the testator's mind accompanied the will, that he knew what he was executing, and was cognizant of the provisions of the will. I think that is all that ought to be required in the proof of the will of a blind person. But it is not essential it should be established by the subscribing witnesses. It may be supplied *aliunde*. As subscribing witnesses, all that it is necessary they should prove, is that ceremony which they witnessed, and which the statute requires. This satisfies the statute; and the additional evidence to which I have referred as proper in certain cases, may be afforded by other persons. The point presented is not entirely new. In *Moore vs. Paine*, 2 *Cas. temp. Lee*, 595, the deceased was blind, and only one of the three subscribing witnesses proved the instructions, the reading of the will to the testatrix, and her approbation of it. The will was sustained, on the ground that only one witness was necessary. In *Longchamp vs. Fish*, 5 *Bos. & Pull*, 415, before the Common Pleas, the precise question came up. That was a will of lands, which by statute was required to be executed in the presence of, and subscribed by, three witnesses. The will was not read over in the presence of the three attesting witnesses. The testator was blind, had dictated the will to one Davis, who read it over to him, took it away, got it copied, brought it back, fairly copied; two months after, the testator made an alteration in it; and then it was executed. It was contended that the will ought to have been read in the presence of the testator by one, at least, of the attesting witnesses. The court, how-

ever, ruled in favor of the will, Chambre, J. remarking as follows: "This question must be decided by the provisions of the statute of frauds. Now, it does not appear that the legislature, when they passed that statute, had in their contemplation execution of wills by blind men." "There cannot be a doubt, if this were an instrument by deed or any other written engagement, that the mere signature of the party, though blind, would be deemed a sufficient execution, and the only thing to be proved would be, that the blind man was not imposed upon. In this case, that fact is completely established, by an unimpeached witness, who took instructions from the mouth of the blind man himself, and wrote them down." The same point has been decided in regard to the will of a blind person, made under the provisions of the statute 1 *Vict.*, c. 26, which so nearly conform to those of our own law. In *Fincham vs. Edwards*, 3 *Curteis*, 63, the testatrix was blind. The will propounded was prepared by a solicitor from a previous will, the alterations having been made in pencil, and the instructions not being produced. The solicitor read over the former will to the testatrix, took her instructions, and drafted the will; but when the will was executed it was not read over to the testatrix in the presence of either of the subscribing witnesses. Sir Herbert Jenner Fust admitted the will to proof, saying, "Certainly, when the court is asked to grant probate of a will of a party totally or almost blind, it must be shewn to the satisfaction of the court, that the contents of the will are conformable to the instructions and intentions of the deceased. Undoubtedly, in this case, the will is not proved to have been read over to the deceased. A reference has been made to Mr. Williams' Treatise; but the case of *Barton vs. Robins* (3 *Phill.*, 455, *note*), shews that it is not necessary that the actual will should be read over, if there is proof that the party deceased knew the contents of it." This decision was affirmed, on appeal, by the Judicial Committee of the Privy Council.

## WEIR vs. FITZGERALD.

The only remaining objection to the probate, is defective execution, on the ground that one of the witnesses, Mr. Albro, does not prove the requisite ceremonials. The answer to this is, that it is not essential they should be proved by both witnesses. The question is, were they performed? Mr. Hopper proves, in a very clear and distinct manner, that they were. If he were directly contradicted by the other witness, the question would be different. But I do not understand Mr. Albro as explicitly denying any material statement of Mr. Hopper. The latter was attending to a professional duty, and would naturally give his attention to such features of the transaction as he knew to be essential. The former was a stranger, called in suddenly, and remaining just long enough to witness the execution. When he went in, he says, he thinks Mr. Hopper said, “*Mr. Brinckley is about making his will.*” My impression had been, from his manner of walking, that he was rather deaf, and his eye-sight was bad. I noticed that the decedent did not appear at that time to hear very well, for as I walked in, he did not appear to notice me, or look up; but after his attention was called, or something was said, *he looked up*. The will was before him on the table. He sat close to it; he sat up straight, with his hands crossed. I can’t say I saw the decedent sign it. *I saw him in such a position that I supposed he signed it.* He sat close to the table, the will was before him. I don’t recollect whether he had or had not a pen. I don’t think I could recollect. I think he had an elbow on the table after a while. I don’t recollect that anything was read while I was in there. I stayed but a few minutes. I could not recollect whether the attestation clause was read while I was there. I think Mr. Hopper drew the will towards him, signed his name, and then handed it to me, and I signed my name; and then he said to the decedent, ‘Do you acknowledge this to be your last will and testament?’ He rose up and looked towards him. The decedent gave a kind of look up, and assented by nodding his head. I

## CASES IN THE SURROGATE'S COURT.

WEIR vs. FITZGERALD.

don't recollect whether his lips moved or not. I saw him nod his head. The question put to the decedent was said perfect and distinct, so that if a person was not very deaf he would hear him. I don't recollect that he asked him any other question; *but I went in such a hurry, and was so thoughtless*, that I don't recollect that he said anything, or that I heard him speak; if he did, it must have been pretty low. As quick as I heard Mr. Hopper ask the decedent if he acknowledged it to be his will, and he assented, I went right out, and left them there in the back room. *I think the subscription of the name of the decedent was at the end of the will when I signed.* I just looked over the will, to see it was a will, and what it was I was signing, and then signed my name." Again, "I think something was said by Mr. Hopper about its being necessary to have witnesses, or something like that." "He said, 'Mr. Albro will witness it,' or something like that. In a minute or two he looked up, after that, and I was thinking whether or no he heard. He was sitting upright. I did not see him sign it. My impression was he signed it, but I might be mistaken. If he had not, I should have thought it something singular, and should have charged my mind with it." "I was not asked by Mr. Brinckley to witness the will, but I think something was said whether I should not witness it; but I won't be sure."

On the other hand, Mr. Hopper distinctly states that he told the decedent "it was necessary to have two witnesses." He consulted Mr. Weir as to whom he should send for, and then sent for Mr. Albro. "When Mr. Albro came into the store where Mr. Brinckley was, I told him Mr. Brinckley was about to execute his will, the law required two witnesses to the will, that I would act as one of the witnesses, and he was wanted to act as the other. Mr. Brinckley was present, and perfectly understood me—that is, he appeared to." The witness then proves the signature of the will by the testator, in the presence of both witnesses, his testamentary declaration, the request to the

## WEIR vs. FITZGERALD.

witnesses, and their signature. Again he says, "I said to the decedent—Mr. Albro, a neighbor, is here, and ready to witness the will. The decedent said he was ready, asked for a pen; I handed it to him; he wrote his name." Again, "He signed it, handed it to me, and I asked him if we should proceed to witness it; he said, Yes. I said, Mr. Brinckley, do you declare this to be your last will and testament you have just signed? He answered, I do. I said, Do you desire Mr. Albro, the gentleman now present, and myself, to witness your signing and declaration? He said, I do. After Mr. Albro came in, and after the decedent had signed the will, I told him there was a little ceremony to go through, and that I would read to him the attestation clause. I read to him the attestation clause, and told him that now Mr. Albro and myself would sign our names, if he desired it. He said he did, he wanted us to do so; and we thereupon did sign it."

This proof, I think, is clearly sufficient, and is not overcome by the want of recollection on the part of the other witness. In England, in regard to a will executed under the provisions of the statute 1 *Victoria*, c. 26, it has been decided that positive affirmative evidence by the subscribing witnesses, of the fact of signing or acknowledging the signature of a testator, in their presence, is not absolutely essential to the validity of a will; and that the court may presume due execution by a testator, upon the circumstances. (*Blake vs. Knight*, 3 *Curteis*, 547.) This is accordant with the current of decisions under our own statute, and the rule is marked by good sense and conformity to the established principles of evidence. Thus, in *Remsen vs. Brinkerhoff*, 26 *Wend.*, 332, it was admitted that where the facts essential to the valid execution of the will are stated in the attestation clause, the mere want of recollection of the witness is insufficient to overthrow the presumption of due execution. In other cases it has been repeatedly decided that where *one* of the subscribing witnesses swears that all the formalities required by the statute

## HEPBURN vs. HEPBURN.

were complied with, the will may be admitted to probate, notwithstanding the other attesting witness may not be able to recollect the fact; and that the attestation clause, after the lapse of time, and on a want of recollection by the witnesses, affords a presumption or inference that its recitals are true. (*Chaffee vs. The Baptist Miss. Con.*, 10 *Paige*, 85; *Jauncey vs. Thorne*, 2 *Bar. Ch. R.*, 40; *Nelson vs. Mc Giffert*, 3 *Bar. Ch. R.*, 158; *See* 19 *J. R.*, 386; 4 *Cowen*, 483; 1 *Wend.*, 406; 11 *Wend.*, 599.) I am satisfied, therefore, that the execution of the will is duly proved in all formal respects; and it having been satisfactorily shown that the will was prepared under instructions given by the testator personally, I see no reason, in the absence of any evidence affirmatively establishing fraud, influence, restraint, or imposition, why it should not be admitted to probate.

## HEPBURN vs. HEPBURN.

*In the matter of the Estate of DAVID HEPBURN, deceased.*

Where the whole estate, real and personal, was given for life to S. and G., with remainder in fee to the issue of G., and in case he died without issue, then over; and the executors were authorized to take charge of, and rent the real estate, invest the personal estate, and pay the whole income to the life tenants,—Held, that all ordinary taxes, assessments, interest on incumbrances, and charges for repairs, should be kept down and paid out of the income.

Legacies ordinarily carry interest from the time they are payable, which is usually a year after the testator's death. The bequest of a life-estate to a child, or to a widow in lieu of dower, are exceptions to the general rule; and in such cases the legatees take interest from the testator's decease.

An executor is not bound to prosecute a claim of very doubtful character, at the request of parties having only a contingent interest in the estate, unless they indemnify the estate against the costs.

Where there are life estates in personalty, and the will directs the fund to

## HEPBURN vs. HEPBURN.

be invested, the investment should be made for the security of the parties who shall ultimately be entitled to the capital.

Where real and personal estate are mingled together, and disposed of in the same way, the personalty may be applied to the payment of a mortgage on the realty, if that be a safe investment, and necessary for the preservation of the property. Interest accumulated before the testator's decease should be paid out of the principal, and not out of the income accruing after his death.

S. F. CLARKSON, *for Petitioner.*

JOHN LEVERIDGE, *for Executrix.*

THE SURROGATE.—The testator by his will gave “the rents, income, and profits of all his estate, real and personal, to his wife, and son George, equally to be divided between them during their joint lives,” with remainder in fee to the issue of George, or, in case he died without issue, the remainder to be distributed among other legatees; for the purpose of which distribution a power of sale was given to the executors. On being cited to account by some of the parties entitled to the residue on the contingency of George dying without issue, the executrix claimed, in her account, certain credits for taxes, repairs, and interest on mortgages, paid by her out of the principal of the estate.

The will authorizes the executors to take charge of and rent the real estate, collect the rents and income, invest the personal estate in stocks, or on bond and mortgage, collect and receive the income and profits thereof, and pay and divide the same between the testator's son and wife for life.

The rule in this State is, that the real estate must bear its own burdens, and the personal estate cannot be resorted to for the purpose of discharging bonds and mortgages. But here the testator has thrown his whole property into one fund, and designed that his wife and son should receive the entire net income for life. There is no strife between the two classes of property. The same parties are interested in both equally. The testator's intention would be answered by the payment of a mortgage on the real estate, if it were a good investment, or necessary for the preserva-

## HEPBURN vs. HEPBURN.

tion of the property, instead of an investment on bond and mortgage elsewhere. The whole estate consists of a mixed fund, devoted to the same general uses ; and as the intention is clear that the life-tenants shall receive the whole income, it is but just that interest accumulated on mortgages before the testator's decease should be paid out of the principal of the estate, and not out of future accruing income. But all ordinary taxes, assessments, interest, and charges for repairs, since the testator's death, must be paid out of the income, after which deductions the life-tenants will receive the balance. The widow and son must be allowed interest on the surplus of the personal estate remaining after the payment of the debts, from the death of the testator. Legacies, ordinarily, are not payable until the expiration of a year, and they carry interest only from the time they are payable. But the bequest of a life-estate to a child, or to a widow in lieu of dower, are exceptions to the general rule ; and in such cases the legatees take interest from the testator's decease. (*Fearns vs. Young*, 9 Vesey, 549 ; *Williamson vs. Williamson*, 6 Paige, 298.)

Before letters testamentary were issued, No. 550 Pearl-street, belonging to the testator, was sold on foreclosure, and the executrix received the surplus moneys remaining after payment of the incumbrance. This surplus is part of the capital of the estate, and must be accounted for as such.

It appears that in the life-time of the testator, he held a bond and mortgage of S. N. Burrill, secured on real estate, which the latter subsequently conveyed to the testator. The legal effect of the conveyance was to cancel the mortgage ; and the mortgagor, who was examined on the part of the objectors, also states that the deed was given and received in discharge of the entire claim. The circumstances are sufficient to exonerate the executrix from any liability for her alleged misconduct in failing to prosecute the mortgagor, if he be chargeable at all on his bond. The bond and mortgage have never been in her possession ; and in view of the whole transaction, it would not be just-

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PARKINSON vs. PARKINSON.

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fiable to compel her to prosecute a demand, to say the least, of so doubtful a character, unless the objectors should indemnify the estate against the costs and expenses.

The executrix has been at fault in not investing the personal estate, as directed by the will; and the fund must be invested in the mode prescribed by the testator, as well because he has so directed, as for the security of the parties who may ultimately, upon a certain contingency, be entitled to the capital of the estate.

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## PARKINSON vs. PARKINSON.

*In the matter of the Estate of WILLIAM S. PARKINSON,  
deceased.*

The testator gave to his widow a legacy of one thousand dollars, out "of money in the safe-keeping of R. S., at lawful interest." This, with other gifts, was declared to be in lieu of dower. By a codicil, after reciting that by his will she was "cut short of an interest" in his landed estate, he gave her the annual interest on two thousand dollars, loaned to B. C. Held, that all the legacies were intended as compensation for dower, and carried interest from the testator's death, on the ground that they were given as an equivalent for the relinquishment of a right, and the legatees had no other means of support under the will. Held, also, that the legacies were in the nature of specific bequests, so that the accruing interest passed to the donee on the testator's decease.

The testator gave his wife the use, for three years, of his house, either to occupy or to let, and at the expiration of that time directed the premises to be sold by his executors, and the proceeds to be divided between his two sons. Held, that the widow was bound to keep down the ordinary taxes during the term.

JOSEPH WALLIS, for Executors.

WILLIAM S. SEARS, for Widow.

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PARKINSON vs. PARKINSON.

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THE SURROGATE.—On the final accounting of the executor, a question has arisen, as to the right of the widow of the testator to interest on certain legacies from the date of the testator's death.

The first legacy is a bequest to her of one thousand dollars out "of money in the safe-keeping of Mr. Robert Stewart," "at lawful interest." This, and other gifts in the will to the same party, are declared to be in lieu and bar of her dower. By a codicil, the testator directed as follows: "Whereas, my wife is, by my will, cut short of an interest in my landed estate, I hereby leave to her, to be disposed of as she may choose, the one hundred and forty dollars annual interest, as it shall become due, on the two thousand dollars loaned to the trustees of the First Baptist Church, of this city, during her life-time, or so long as she remains my widow." The reason assigned for this bequest is substantially the same as if he had referred, in so many words, to his wife's dower, of which she was barred; the intention being to give this additional legacy in lieu of what he had previously taken away, and as a sort of compensation for it.

Legacies generally carry interest only from the time they become payable, that is, at the end of a year, when no other period is fixed. There are exceptions to this rule, but they do not apply to the case of a wife (*Stent vs. Robinson*, 12 *Vesey*, 461), unless the legacy is a gift of a life-estate in the residue, or be given to her in lieu of dower. In the present instance the legacies are given with that object, and that circumstance entitles her to interest from the death of the testator (*Williamson vs. Williamson*, 6 *Paige*, 305), on the ground that the bequest is given as an equivalent for the relinquishment of a right, and the legatee has no other means of support from the bounty of the testator. It is analogous to a legacy in satisfaction of a debt, which always carries interest from the death of the testator. (*Clarke vs. Sewell*, 3 *Atk.*, 99.) Besides, the first legacy being of "one thousand dollars out of money in the

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PARKINSON vs. PARKINSON.

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safe-keeping of Mr. Robert Stewart," "at lawful interest;" and the last being "the one hundred and fifty dollars annual interest, as it shall become due on the two thousand dollars loaned," &c.,—these are in the nature of *specific* gifts (*Wms. on Exrs.*, 1003); and specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death, so that the accruing produce, dividends, or interest, passes to the donee. (*Wms. on Exrs.*, 1221.)

The testator gave his wife "the use," "for three years," of his house in Frankfort-street, "either to occupy or to let, as she may prefer," and at the expiration of that period he directed the property to be sold by his executor, and the proceeds to be divided between his two sons. The question is, who shall pay the taxes on these premises. The will is silent on the point. I think the tenant is bound to keep down the accruing charges on the property, where he takes by gift and not by contract. Not to do so, would be in the nature of permissive waste. The party enjoying the present use and possession of property should keep the estate clear of such burdens as arise from the ordinary annual taxes, and not throw them upon the reversion.

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CAMPBELL vs. RENWICK.

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*In the matter of the Estate of WILLIAM RENWICK, deceased.*

A claim for the mesne profits of lands occupied by the intestate may be allowed out of the proceeds of his real estate, sold for the payment of his debts.

It is competent on the sale of real estate, for the payment of the debts of the deceased, or on the distribution of the proceeds, to offer any equitable defence against the claims of a party alleging to be a creditor; and the heirs are not restricted to a legal defence.

The common-law action of trespass for mesne profits was not abolished by the Revised Statutes. Trespass being an action for a tort, died with the party defendant, and did not survive against his executor or administrator.

It is, however, provided by statute that for wrongs done to the property, rights, or interests, of another, for which an action might be maintained against the wrong-doer, an action may be brought after his death against his executors or administrators, in the same manner, and with the like effect, as actions upon contracts.

An action for use and occupation lies only where the relation of landlord and tenant has existed, founded on some agreement, express or implied. The Revised Statutes have transformed the claim for mesne profits, consequent on a recovery in ejectment, into a proceeding in the nature of an action for use and occupation. Mesne profits can only be recovered for a period of six years previous to the commencement of the action. The term of eighteen months is not deemed any part of the time limited by law for the commencement of actions against an administrator or executor. In a proceeding for the sale of real estate for the payment of debts, the Surrogate may award a feigned issue.

H. M. WESTERN, *for Claimant.*

JOSEPH BLUNT, *for Heirs.*

W. S. SEARS, S. M. WOODRUFF, G. C. GODDARD, *for Creditors.*

THE SURROGATE.—On the distribution of the proceeds of the sale of the real estate of the intestate, for the payment of his debts, a claim is interposed by Duncan P. Campbell for the mesne profits of Macomb's dam, alleged

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CAMPBELL vs. RENWICK.

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to have been in the possession of William Renwick, at and previous to the time of his death.

This property consists of two parcels, as to one of which it does not sufficiently appear that the intestate was in possession, claiming title in his own right. He seems to have acted as agent for James Renwick, and it is therefore unnecessary to enter into the consideration of the title.

The other portion belonged to Robert Macomb, who, with his wife, executed to Campbell, as treasurer of the Protestant Episcopal Charity School, two mortgages for \$5,000 each,—one dated 31st August, 1815, and recorded 25th September, 1815; the other dated 19th December, 1815, and recorded 26th December, 1815. These mortgages were regularly foreclosed; and Campbell, having become the purchaser at the sale, received the master's deed, dated 31st December, 1822, and recorded 8th February, 1823.

The counsel for the heirs have set up in opposition to this claim, title in the intestate, under a sheriff's deed, or rather a deed executed by the executors of Jared L. Bell, former sheriff of New York, dated March 9, 1831. It is not requisite that I should discuss the questions arising under this instrument, as the deed only purports to convey the title which Robert Macomb had October 28, 1817—the date of the judgment against Macomb, to satisfy which the sale was made. The title of Campbell, under the master's deed on the foreclosure of the mortgages executed in 1815, is clearly superior.

But it is contended on the part of the heirs, that there are equitable considerations which should debar the claimant from a recovery. It appears that in November, 1826; it was proposed to form an association denominated "The New York Hydraulic Manufacturing and Bridge Company," for the management of property at Macomb's Dam, and adjacent thereto. The lands were valued at \$100,000, and the stock was divided into one thousand shares. Campbell subscribed for four hundred, Mrs. Macomb by her trustee,

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CAMPBELL vs. RENWICK.

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James Renwick, for three hundred, and other parties for two hundred and sixteen. The lands were to be conveyed to Campbell and James I. Rosevelt in trust for the shareholders, and they included that part of Macomb's Dam which constitutes the premises now in question. Mr. Campbell was at that time owner of this part, under the master's deed, on the sale in foreclosure, 31st December, 1822. This was to form part of the property of the association; all the rest of the lands belonged to Mrs. Macomb. A deed was accordingly executed by Robert Macomb, and Mary his wife, and James Renwick, her trustee, to Duncan P. Campbell and Philip Rhinelander, as joint tenants, embracing all the several parcels designed to constitute the capital of the Hydraulic Manufacturing and Bridge Company. This instrument was acknowledged towards the close of July, 1827. As Mr. Campbell had at that time demands to a large amount existing against Mr. Macomb, then amounting, as appears by an account stated, to over \$40,000, it was agreed, on the 1st August, 1827, that the account should be liquidated, and finally settled, at forty thousand dollars, "payable in the stock of the New York Hydraulic Manufacturing and Bridge Company, at par, agreeably to their articles of association." This amounted to the value of the four hundred shares of the stock subscribed for by Mr. Campbell. On the 2d of August, 1827, he acknowledges the receipt of four hundred shares of the stock in full payment of the account.

Now, the account thus settled includes charges covering the same bonds and mortgages, on the foreclosure of which Campbell acquired title to the parcel of land contributed by him to the capital of this company; and it is therefore argued that those mortgages were paid, and the title acquired under the foreclosure and master's deed, was equitably discharged or released for the benefit of Macomb and wife.

On the credit side of the account stated between Macomb and Campbell, appears a credit to Macomb on account of "Harmanus Bouck's bond and mortgage, accepted

## CAMPBELL vs. RENWICK.

at \$10,000." This bond and mortgage appear to have been transferred by Macomb to the treasurer of the New York Protestant Episcopal Public School, as treasurer of which institution Campbell originally received the two mortgages of Macomb on the property in question. And on December, 21st, 1830, Campbell requested the treasurer of that institution to acknowledge satisfaction of those mortgages, stating that the entire balance due thereon had been satisfied by means of the securities against Harmanus Bouck assigned to the treasurer.

The point, then, is whether Campbell's legal title, under the master's deed, has been equitably affected by the subsequent transactions in relation to the mortgages so foreclosed. I think not. There can be no reasonable doubt that Campbell designed to receive the four hundred shares of stock as an agreed valuation of his land, and as a liquidation of the sum due him by Macomb. And perhaps such an effect should in equity be given to his acts, that his title should enure to the benefit of all the parties interested in the company, according to the shares and interests of the respective stockholders. But, for some cause or other, probably from inability to effect the incorporation of the company, the objects of the parties were never carried out, and the association never went into operation. To hold, therefore, that his title to the land to be contributed by him, was lost by virtue of dealings which failed in their design, and were ineffectual to the accomplishment of the general end proposed, would not be just and reasonable. It may be, that by virtue of the deed to Campbell and Rhineland, as joint tenants—whereby Macomb and wife and Renwick conveyed all the lands intended as the capital of the company, among which was the very parcel to which Campbell was entitled under the master's deed—Campbell is estopped from setting up his title against the parties who were shareholders in the company. As against strangers, however, or as against parties claiming against the company, he is not estopped. Although, therefore, under the

## CAMPBELL vs. RENWICK.

deed to him and Rhinelander, in joint tenancy, he may be a trustee for the benefit of the shareholders, and cannot set up his own title against them; yet strangers have no equity tending to impair the full legal title vested in him under the master's deed. I am, therefore, of opinion, he has established his title to this parcel of property, though the recovery may enure to the benefit of the shareholders of the contemplated company.

With this view of the validity of the claimant's title to the real estate in question, it becomes necessary to consider whether he can establish any legal or equitable debt against the estate of William Renwick, by reason of Renwick's occupation of the premises. The mode of recovering damages in such a case, at common law, was by the action of trespass for mesne profits. This action was not abolished by the Revised Statutes (2 *R. S.*, 3d ed., p. 406, § 45), the provisions of which, on this subject, apply only to mesne profits the right to which results from a recovery in ejectment. (*Leland vs. Tousey*, 6 *Hill*, 328.)

Campbell brought ejectment against Dingee, Renwick's tenant, in April, 1845, and verdict was rendered in that case in October, 1849. The recovery therein will relate to the time title was acquired, and form the basis of such a possession as would enable the plaintiff to bring trespass against all other wrong-doers. (6 *Hill*, 332.) Trespass being an action for a tort, by the rule of the common law died with the party, and did not survive against his executor or administrator. (1 *Saunders*, 216, notes, d. (1); 1 *Chitty*, Pl. 79, 225.) Our statute, however, provides, that for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrong-doer, and *after his death, against his executors or administrators, in the same manner and with the like effect in all respects as actions*

## CAMPBELL vs. RENWICK.

*founded upon contracts.* (2 R. S., 3d ed., p. 543, § 1; See *Revisers' notes*, 3 R. S., 2d ed., p. 781.)

It is said also, that the tort may be waived, and the mesne profits recovered, in an action for use and occupation. This is true only where the relation of landlord and tenant has existed, founded on some agreement, express or implied. There is nothing from which to infer that relation in this case; but, on the contrary, the possession of Renwick seems to have been entirely disconnected from the title of Campbell. There was no privity between the parties. (*Feathers-tonhaugh* ads. *Bradshaw*, 1 *Wendell*, 134; *Smith* vs. *Stewart*, 6 *J. R.*, 46.) Besides, the former rule was, that when the plaintiff had brought ejectment he could recover for use and occupation only for the time previous to the day of the demise laid in the ejectment, having, by bringing that action, elected to consider the possession tortious. This would lead to the limitation of the claim for mesne profits to a period antecedent to April, 1845, when the ejectment suit was brought. It might be a question, however, whether this rule would any longer prevail, as the Revised Statutes have transformed the claim for mesne profits consequent on a recovery in ejectment, into a proceeding in the nature of an action for use and occupation. (2 R. S., 3d ed., pp. 406, 407, §§ 46, 47, 54.) But it is unnecessary to pursue that question, as the statute gives an ample remedy for a wrong of this kind, against the estate of the wrong-doer.

In an action for use and occupation, or trespass for mesne profits, no more than six years' rent of the premises can be recovered. (2 R. S., 3d ed., p. 407, § 51.) The commencement of the action determines the period. William Renwick died August 31, 1847. The term of eighteen months after his death is not deemed any part of the time limited by law for the commencement of actions against his administrator. (2 R. S., 3d ed., p. 544, § 8.) The claimant is entitled, therefore, to the mesne profits for

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GOTTSEBERGER vs. SMITH.

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about three years and ten months, not having prosecuted his claim until May, 1851.

As to the amount of the rent, or the annual value of the premises, I should, under the circumstances, be unwilling to fix it above the proper proportion of the rent reserved in the lease to Dingee, which should be allowed for this part of the premises. I do not pronounce upon that point definitely, being inclined, if the parties desire it, to award a feigned issue, so as to present all the questions in dispute in this case for trial by a jury. (2 R. S., 3d ed., p. 165, § 14.)

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GOTTSEBERGER vs. SMITH.

*In the matter of the Estate of FRANCIS O'NEIL, deceased.*

When letters of collection are superseded, and the collector is cited to account, he may be compelled to deliver to the party succeeding to the administration of the estate, all the property of the deceased in his hands; and it is competent for the Surrogate, on the accounting, to pass upon any claim of the collector to property belonging to the deceased at the time of his death, of which the collector acquired title during the period of his collectorship. But where the collector claims title to certain leasehold estate of the deceased, by virtue of a lease from the owner of the fee, made prior to his appointment as collector, the Surrogate has not jurisdiction on the accounting of the collector to try the validity of a title thus acquired, before the fiduciary relations of the collector with the estate commenced.

STILLWELL & SWAIN, HARRIS WILSON, for Administrators.

G. C. CARPENTIER, JOHN GRAHAM, for Collector.

THE SURROGATE. The testator died in March, 1847; and, the probate of his will being contested, Thomas S. Henry was appointed collector by the Surrogate, on

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GOTTSBERGER vs. SMITH.

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May 1st, 1847. His letters having been subsequently revoked, George J. Smith was appointed collector, February 16, 1850.

The will having been admitted to probate, Gottsberger and O'Neil were appointed administrators with the will annexed, January 11, 1851. Smith, the collector, was thereupon cited to account, by the administrators, and on the filing of his account, objections were interposed, on the ground that the collector had not accounted for the rents of certain premises of the testator, which had been received by him, and for which it was alleged he was chargeable as collector.

It appears that the testator was in the possession of the premises at the time of his death; but the collector sets up title in himself by virtue of a lease from the owners of the property, made prior to his appointment as collector, and posterior to the testator's decease. It is alleged that this lease was obtained by him when he was the agent of the former collector, Mr. Henry, and when, from his fiduciary relations to the estate, he could not deal therewith so as to acquire a valid title for his own benefit. It is also contended that he was a co-legatee, with Daniel O'Neil, of the leasehold premises, and that his acts in regard to the property enured to the advantage of his co-legatee.

The special letters of administration issued to a collector, authorize the preservation and collection of the goods, chattels, personal estate, and debts, of the deceased; and when his authority is superseded, the collector may be compelled to deliver to the executor or administrator all the property and money of the deceased in his hands, and to render an account, on oath, of all his proceedings. The important question is presented in this case, whether it is competent for the Surrogate, on the accounting of a collector, to pass on the validity of his claim of title to property alleged to have belonged to the testator at the time of his death. Had the title been acquired during the period of his collectorship, there could be no reasonable doubt, I think, that, in

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GOTTSBERGER vs. SMITH.

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passing upon his account, the Surrogate possessed authority to supervise all his acts within the limit of his special administration, determine upon their validity and effect, and the extent of his responsibility in consequence thereof. If the collector, for example, had, during the existence of his trust relations with the estate, renewed a lease in his own name, and, on being called to account, were to claim the benefit of the renewal, the Surrogate should not hesitate to pronounce upon the transaction, hold the collector responsible for the rents, and require him to transfer the lease to the executor or administrator. But where the title was acquired, or the facts upon which the claim of title is based, transpired, before the fiduciary relations of the claimant as collector, by virtue of his letters, commenced, is it competent for the Surrogate, on the accounting of the collector, to consider and pass upon the validity of that title? How is the matter brought within the jurisdiction of the court? Not, certainly, because the dispute is about the estate of the deceased; for if a third person, a stranger, had, previous to the collectorship, procured from the owners a new lease, I could not try his title on the accounting of the collector. This is conceded by the counsel for the administrators; but they urge that the fact that the new lessee happens to be the collector, brings the requisite parties before me; and, in the next place, they insist that the decision of the question of title is essential to a correct accounting. But the case is not strictly analogous to the accounting of an administrator. There, the administrator represents the estate at the time of the accounting; and if he claims title against the estate, the Surrogate might, perhaps, from the necessity of the case, pass upon the question. Here, the estate is represented by the administrators, and they may try the title at law: wherefore it is not indispensable that the controversy should be determined before me. It follows that, in the present instance, I have not jurisdiction, by virtue of any acts of the collector, during the period of his collectorship, nor by reason of any abso-

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GOTTSBERGER vs. SMITH.

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lute necessity existing for the consideration of the question before adjusting and settling the collector's accounts. If Smith had received the rents of this property during his collectorship, as collector, of course he might be held to account for them in that capacity. But he denies that, and it is not proven. If he was in possession before his appointment, under claim of title in himself, as against the estate, the presumption is that he continued to collect the rents in his own right, and not under his letters. It is admitted that if there had been an ostensible outstanding estate in Smith, at the time of the testator's death, it might very properly be contended that the claim of the administrators should be tried before another tribunal. If so, then the fact that the same person is claimant and collector is not enough to give me jurisdiction. This makes the whole question to depend upon the circumstance that the adverse title was acquired subsequent to the testator's decease, and there is obviously no element in that naked fact which gives jurisdiction. I am inclined, at all times, to a rigorous exercise of the powers of the court in holding trustees to a strict accountability for all their acts during the period of their trust; but the court should proceed with great delicacy in exercising incidental jurisdiction, when there exists an undoubted remedy for the alleged evil elsewhere, especially when the rights of sureties on the official bond of the officer sought to be made liable, may be seriously affected. I must, in consonance with these views, decline trying the right of the collector to the leasehold estate in question, leaving the parties to their action in another court.

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CAMPBELL vs. LOGAN.

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## CAMPBELL vs. LOGAN.

*In the matter of proving the last will and testament of  
CATHARINE MACABEE, deceased.*

The probate of a will of personalty, is conclusive as to the validity of the will in every case, except in a proceeding instituted for the purpose of revoking, or modifying the probate.

The statute has made no express provision for revoking a probate where another and later will has been discovered: though the power to revoke seems to be implied in the section declaring the force of the probate as evidence, until reversed on appeal, revoked on allegations filed within the year, or "*declared void by a competent tribunal.*"

The power to revoke probate has been exercised by the ecclesiastical courts, whether the will was proved in common or in solemn form. The Surrogate may open a decree of probate for the purpose of taking proof of a later will. This power is incidental to his jurisdiction of the proof of wills, and is essential to the administration of justice.

The Surrogate's Court proceeds in all matters relating to the probate of wills, and the administration of the estates of deceased persons, according to the course of the common and ecclesiastical law, as modified by statutory regulations. Where jurisdiction is given by statute, the mode of exercising it in cases not specially provided for, must be regulated by the court in the exercise of a sound discretion, according to circumstances.

Although a will has been admitted to probate, a legatee under a later will may propound the latter for probate, and is not concluded by the probate of the previous will. If the last will revokes the former, the first decree will be recalled. If the two instruments are not entirely inconsistent with each other, the decree may be so modified as to declare that both instruments, taken together, constitute the last will and testament of the deceased.

Whether it is a sufficient compliance with the statute regulating the manner of executing wills, for one witness to write the name of the other, or for a witness to attest by mark instead of subscribing his name, *quære*.

Where attestation was made, by one witness signing his own name, and holding and guiding the hand of a second witness while the name of the latter was signed,—*Held*, that the execution was valid.

The testatrix requested her will to be altered in the presence of the wit-

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CAMPBELL vs. LOGAN.

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nesses; it was altered, read aloud, and executed,—*Held*, that there was sufficient evidence of testamentary declaration.

A. R. DYETT, *for Legatee.*

E. H. NICHOLS, J. THOMPSON, W. G. STERLING, *for Executor.*

**THE SURROGATE.** The testatrix died on the 14th of May, 1851, leaving surviving her Charles Macabee, her husband, and Charles Logan and Ann Campbell, her brother and sister, and only next of kin. On the sixteenth of May, Charles Logan applied for the proof of a will dated the 8th of May, 1851, wherein he was named executor. All the parties were duly cited, and the will was admitted to probate, without contest, on the 19th of June last. On the 26th of June, James Campbell, the husband of the sister of the deceased, propounded for probate an instrument dated the day after the will of the 8th of May. The parties having appeared on citation, objection was made to any further proceeding, on the ground that the probate of the will of the 8th of May, was conclusive as to the validity of that will. This position is sound and unanswerable in every case except in a proceeding which has for its very object, directly or indirectly, to revoke or modify the probate. If the court possess the power to revoke, open, or alter its orders, it is self-evident that the order itself cannot be set up as a bar to the exercise of an authority which presupposes the existence of some decree or order on which to act. The real question, therefore, is whether after a will is admitted to proof, the Surrogate has control over his own decree of probate. The subject is one of moment, and deserving of much consideration.

The statute has provided the means of enabling the next of kin of a testator, within a year after the probate, on filing allegations against the validity of the will or the competency of its proof, to compel the executors to prove the will anew; and, after hearing the proofs, if the Surrogate decide the will to be invalid, or not sufficiently proved, he

## CASES IN THE SURROGATE'S COURT.

CAMPBELL vs. LOGAN.

may annul and revoke the probate thereof. But no provision has been made for revoking the probate, where another and later will is subsequently discovered. And yet such a case may often occur after proof of a previous will, and the parties in interest under the last will be deprived of their rights, without notice and without fault or negligence, unless a remedy exists beyond the express provisions of the statute. There is nothing in the law forbidding the exercise of such a power; but, on the contrary, there is a very fair implication in its favor in the very section which declares the probate to be conclusive evidence of the will until reversed on appeal, or revoked by the Surrogate on allegations filed within a year by the next of kin, "*or the will be declared void by a competent tribunal.*" (2 R. S., 3d ed., p. 121, § 21.) This section was proposed by the Revisers as a rule of *evidence* declaratory of the existing law (3 R. S., 2d ed., p. 630), and was not designed to restrict the power of the Surrogate. Indeed, it distinctly recognizes the competency of *some* tribunal to declare the will void; and if that does not lie within the jurisdiction of the Surrogate, I do not know where the power resides. (*Williams on Wills*, 450-457.) No other court possesses jurisdiction in respect to the proof of wills of personal estate; and if the Surrogate has no authority to open a decree for the purpose of correcting a mistake, or to let in the proof of a revocation, or a later will—if the moment a decree of probate is passed, the door is closed, and the act is irrevocable, notwithstanding the discovery of circumstances showing the probate to be erroneous, then it is evident that justice may be sacrificed to the forms of proceeding. This power has always been exercised in the English Ecclesiastical courts. Wentworth says, "If there be falsehood in the proof, were it *communifor*ma, that is, without witnesses, or by examination of witnesses, (that is, in solemn form), yet it may in the spiritual court be *undone*, if disproof can be made, or proof of revocation of that will was once made, *or of the making of a later.*" (*Wentworth, Off. Ex.*,

## CAMPBELL VS. LOGAN.

111, 112. See 1 *Hagg.*, 241, 645; 3 *Hagg.*, 243; 1 *Phill.*, 83; 3 *Phill.*, 83, 56; 1 *Add.*, 219, 365; 1 *Curt.*, 691; 3 *T. R.*, 125; 4 *Serg. & Raw.*, 201.)

I consider the power now under discussion as essential to the administration of justice and as a necessary incident to the exclusive jurisdiction of the Surrogate over the subject matter of the probate of wills. In this connection my attention has been drawn to the authority exercised by the chancellor acting under the special power conferred on him by the English bankrupt law. Without any provision in the statute for that purpose, he has constantly exercised jurisdiction in recalling certificates and superseding commissions, on the principle that the power is incidental to the jurisdiction, and necessary for the ends of justice. (*Eden on Bankrupt Law*, 412, 431)

But the spiritual courts have always exercised this power over their own decrees; and the Surrogate's Court, though of inferior jurisdiction, being a tribunal proceeding according to the course of the common law, and recognized by the common law, proceeds in all matters relating to the probate of testaments and the administration of the estates of deceased persons in conformity with prescription and established usage, except as modified from time to time by statutory regulations. It is true, the revised statutes define the jurisdiction of the Surrogate, and direct its exercise "in the cases and in the manner prescribed by the statutes of the State" (2 *R. S.*, 3d ed., p. 318, § 1); but the power to take the proof of wills being given generally, the mode of its exercise in a case not provided for by statute, must be regulated by the court in the exercise of a sound discretion according to the peculiar circumstances of each particular case. For example, there can be no doubt that a legatee or party interested in a later will, discovered after a previous will has been admitted to proof, has a right to have the last will proved and letters testamentary issued thereon. But there cannot be two last wills and two sets of letters at the same time. It is incidental,

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CAMPBELL vs. LOGAN.

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therefore, to the exercise of jurisdiction in taking probate of the last will, and the consequent grant of letters, to revoke the first probate and the first letters testamentary.

It may not be always necessary to revoke the first decree entirely, unless the effect of the last will is to establish an entire revocation of the first. That depends upon the extent to which the later will modifies, or is inconsistent with, the provisions of the former. And there may be cases, therefore, where, instead of revoking absolutely the first decree of probate, it will be sufficient so to modify it as to declare that both instruments, taken together, constitute the last will and testament of the deceased. Thus, in the present instance, the will of May the 8th, 1851, disposes of the real estate of the testatrix equally between her brother and sister, and, though silent as to the personalty, appoints an executor. The alleged will of the 9th of May, bequeaths the personal estate to Mrs. Campbell; and, if proved, it would require a modification of the previous decree. For, notwithstanding the first will gives no legacies, the appointment of an executor defines its type as a will of personal estate; and, in fact, it was both propounded and admitted to proof as a will of real and personal estate.

Though Mrs. Campbell is the sole legatee, under the will last propounded, she is also a sister of the deceased; and having been duly cited to attend the probate of the will of the 8th of May, and having failed to appear and contest it, it is urged that she is estopped from now propounding a subsequent will. She alleges, in excuse, sickness, failure to consult counsel, and mistake as to the necessity of appearing and producing the will of the 9th of May, growing out of her knowledge that the will of the 8th of May only disposed of the real estate. But the testatrix was a married woman, living separately from her husband, under articles which gave her certain powers over her estate. And it is now urged by her husband that, if she died intestate, a contingency has occurred not provided for by the trust deed, and, as her husband, he will become en-

## CAMPBELL vs. LOGAN.

titled to her personalty. If this be so, then the citation to Mrs. Campbell, as next of kin, should not conclude her, she having no interest as next of kin. And so, on the other hand, if she was properly cited as next of kin, then she has a right, in the same character, to compel the proof of the will *de novo*, by the executor, within the year; and in that way the paper of the 9th of May could be brought in. She may as well, therefore, attain her object in the mode now adopted, and I shall proceed to consider whether the will of the 9th of May has been duly proved.

It is written on a single sheet of paper, immediately beneath a previous testamentary disposition, bearing date April 28th, 1851. The whole document reads as follows:

NEW YORK, April 28th, 1851.

In the name of God, Amen, I Catharine Macabee, now living in New York, being of sound mind and understanding, do make my last will and testament, as follows: that is to say, I will leave all my household furniture and money to my sister, Anne Campbell, after all the expenses is paid.

CATHARINE MACABEE,

For the Bowery Savings Bank.

CATHARINE MACABEE.

WILLIAM S. CROOKER,

Witness, SAMPSON CROOKER,

SARAH M. DISNUFF.

May 9th. I now give all my household furniture, and all my money, to my sister, Ann Campbell.

CATHARINE MACABEE,

WILLIAM CROOKER,

SARAH M. DISNUFF.

It appears, in proof, that the name of the testatrix was subscribed to the will by William Crooker, one of the witnesses, he guiding her hand, and she holding the pen. The

## CAMPBELL vs. LOGAN.

same thing occurred as to the subscription of the name of the other witness, Sarah M. Disnuff, who took hold of the pen while Crooker conducted it, and wrote her name. It thus happens that the whole of the instrument dated May 9th, was written by one of the witnesses, the testatrix and the other witness not even having made their marks.

The statute of frauds expressly permitted the signature of the testator to the will to be made by some other person in his presence, and by his express direction. The 9th section of the statute of 1 *Vict. c. 26*, and the act concerning wills, 1 *R. L.*, 364, in terms allowed the same thing. Under these statutes it has been decided that the signature of the testator, or of the witnesses, by making a mark, is sufficient. (*Baker vs. Dening*, 8 *A. & E.*, 94; *Wilson vs. Beddard*, 12 *Simon*, 28; *Harrison vs. Harrison*, 8 *Vesey, Jun.*, 185; *Addy vs. Griw, id.*, 504; *Jackson vs. Van Dusen*, 5 *John. R.*, 144; *Doe vs. Milton*, 7 *Halsted*, 70; *Adams vs. Chaplin*, 1 *Hill*, *South Car. Eq. R.*, 266.)

But (In the goods of John White, 2 *Notes of Cases*, 461) Sir H. Jenner Fust held the execution of the will insufficient, where it appeared that one of the witnesses signed not only his own name, but that of the other witness, his wife, who was present at the time. The judge put the decision on the ground that the statute did not authorize any person to subscribe the witness's name—that the act required both witnesses to subscribe "either by signature or mark." There was no evidence that the wife had, in fact, become a party to the subscription of her name as a witness, in which respect that case differed from the following. In *Harrison vs. Elvin*, 3 *Qu. B. R.*, 117, a will made after the statute of 1 *Vic. c. 26*, was attested by one witness, in his own handwriting; and he also held and guided the hand of a second witness; and in this way the name of the second witness was written. This was held a good attestation, the second witness being really a party to the act of signing his name.

Our statute, in prescribing the forms requisite to the due

execution of a will, does not in terms permit the subscription of the testator to be made by another person ; but that mode of execution is recognized, by implication, in the section which requires every person "who shall sign the testator's name to any will by his direction," to "write his own name as a witness to the will," under a certain penalty for a failure in that respect. (2 R. S., 3d ed., p. 124, § 33.) There is nothing in the statute authorizing one witness to sign the name of another witness. The question is, therefore, brought down to the same point presented in *Harri-son* vs. *Elwin*, that is, whether, by holding the pen while the other witness guided it, the former so became a party to the act of signing, that it may properly be termed his signature, though he was aided by another in making it. Our statute differs from the English act, in requiring each of the witnesses "to sign his name as a witness at the end of the will," while the latter only prescribes that the witnesses shall "attest" and "subscribe" the will. The will, by our act, is simply required to be "subscribed" by the testator ; but each of the witnesses must "*sign his name.*" For the witness merely to put his mark, is not a signature of his *name* ; and where witnesses attest by mark, their names are generally written by other persons, without the marksmen taking any part in the act. In such cases, a question may very well arise, whether that mode of execution is sufficient ; but, in the present instance, the facts show a physical participation of the witness in the act of signing her name, which I think it reasonable to hold a sufficient compliance with the statutory requirement.

Other objections are made to the probate, which I will proceed to consider. The history of this transaction appears to be as follows : William Crooker, one of the witnesses, was sent for by the testatrix on the 28th of April, 1851. She then dictated the will ; he wrote it, read it to her, and she approved it. She then held the pen, the witness signed her name for her ; she declared it to be her last will and testament ; and the witnesses, at her request, attested it.

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CAMPBELL vs. LOGAN.

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On the 8th of May succeeding, the testatrix executed another will, disposing of her real estate equally between her brother and sister, and appointing her brother executor. This instrument was drawn by filling in a printed form of a will, and contains a printed clause revoking all former wills.

This transaction having occurred, William Crooker testifies that the testatrix sent for him again, on the next day, the 9th of May. "She said, there had been a new will made, and it had been read over to her in such a hurry that she did not, scarcely, understand any of it, and she was asked if she would sign it, and she said, 'Oh, yes, she would sign it.' That she did not know what she signed; she was then very sick. She wanted me to alter the will I drew, April 28, to a later date. She wanted all her money, her household furniture, and clothing, to be given to her dear sister Ann. These were her words. She said she was afraid there was some intriguing in relation to the will she spoke of. That will was made, I think, a day or two before the 9th of May. She was afraid it was not as she wanted it. This will, of April 28, was just as she wanted it to be. I asked her about her other property; she said, it was not worth while to say anything about that in her will, because that would naturally fall between her brother and sister. She asked me to draw this will, of May 9th: I did so in her presence. Mrs. Campbell and Mrs. Disnuff were present. After I drew it I read it aloud to her. Mrs. Campbell and Mrs. Disnuff were present when it was read. After it was read I signed it for her, she holding the pen, and I guiding it for her. All I remember she said after signing was, that the writing was sufficient, she was satisfied with it. At the time I read aloud the writing of the 9th of May, I also read aloud the whole of the previous paper. She asked me and Mrs. Disnuff to sign the writing of the 9th of May. I don't recollect she said the paper of the 9th of May was her last will, but she said it was all right. Mrs. Disnuff was present during

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CAMPBELL vs. LOGAN.

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all the conversation about the previous will." "When she executed the will of May 9th, I believe she was as sane as she could be. I did not see anything otherways. I, and Mrs. Disnuff signed the will of May 9th, in decedent's presence. Mrs. Disnuff was in the room when I went in. The decedent, on the 9th of May, said that she wished to have her will sent to Mr. Sampson Crooker, for him to sign it, as he was not there: Mrs. Disnuff came for me to my house; she also wanted Mr. Sampson Crooker. The message came to us both; he was not at home."

Mrs. Disnuff testifies substantially to the same facts in regard to the execution of both papers: that they were drawn by Mr. Crooker, as directed by the testatrix, were read aloud,—and also in relation to each instrument, that the testatrix "called it her will." Mrs. Disnuff was very far from being an intelligent witness, and got into some confusion about the will of the 8th of May. But she subsequently recollected herself on that point with more distinctness. She also states, "I went after Mr. Crooker, at Mrs. Macabee's request; she told me to go for him, to ask him to come down and make her will; that was the first time, on the 28th of April. The second, on the 9th of May; she told me to go for him to come down and alter her will. She told me to ask both the Crookers to come; she wanted both of them to sign. Mr. William Crooker came. She said, when he came, she was very glad to see him. She wanted him to alter her will for her; she said she wanted the date altered." The witness further states, in regard to the will of the 8th of May, that the decedent "after it was executed, sent for Mr. Crooker to alter her will; she said she thought her brother wanted to cheat her. She fretted about it; she cried about it, before I went for Mr. Crooker."

I think this evidence establishes a substantial declaration by the decedent of the testamentary character of the instrument, at the time of its execution. She declares her intention, in the presence of both the witnesses, to have

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CAMPBELL vs. LOGAN.

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the will of April 28 altered, so as to be posterior in date to that of the 8th of May, and gives the instructions herself; it is done in her presence, the whole instrument is read to her aloud, including the paper of the 28th of April, which contains on its face a testamentary declaration; and then she pronounces it correct, and the execution is consummated. Indeed, the object of the transaction was to bring down the will of April 28th to that date; and not to alter its terms, but alter its date,—so that nothing more was designed than a re-execution, which was accomplished by the new writing commencing with the words, “I now give,” &c. Independently of all the other circumstances, if there were nothing else than the reading of the whole instrument aloud, and the approval of the testatrix, I think that would be a sufficient testamentary declaration.

I see no reason to give any weight to the suspicions suggested as to the genuineness of the instrument, or the honesty and veracity of the witnesses; and there is sufficient evidence that the testatrix was quite as competent to make a will on the 9th as she was on the 8th of May. Nor is there any satisfactory proof that the will now offered for probate was not in harmony with her wishes and affections otherwise expressed. The design of giving her personal estate to her sister, which existed on the 28th of April, seems to have been adhered to, and in consequence of the execution of the will of the 8th of May, to have been subsequently ratified and confirmed. We have not enough of the circumstances attending the execution of the will of the 8th of May, to judge why the personal estate was not disposed of, in that instrument. And to argue that she did not intend to bequeath her personalty, because, by the terms of the trust deed, she had no right to do so, is to assume a legal proposition, at least disputable. The motives of unlearned persons cannot be very nicely and critically examined on the assumption of their correct comprehension of the precise terms and legal effect of a trust deed like that. Unless the witnesses to the will have

## CAMPBELL vs. LOGAN.

forsworn themselves, she certainly did attempt to will her personalty on the 28th of April, and again on the 9th of May; and against testimony so positive and circumstantial, mere conjecture, however plausible, should not be indulged.

The anxiety of Campbell and his wife, as subsequently evinced, to discover the precise contents of the will of the 8th of May, seems to have subsided, on its appearing that it devised the real estate equally between brother and sister. And though there was some dispute among the parties in the presence of the testatrix, in the course of which the papers of April 28th and May 9th were not mentioned in terms, yet it seems that the dispute was about the will of the 8th of May, and the money of the testatrix, which Campbell claimed belonged to his wife. It is difficult to get a clear idea of what was said on that occasion, and but little if any weight can be attached to a conversation the exact purport of which is doubtful. I cannot infer from it, that Campbell did not set up the wills of the personalty, for it appears that he claimed the money; and that, therefore, Logan asked the testatrix whether the will of the 8th of May was not her last will and testament. Why do this, unless some other will was alleged? I do not, consequently, feel justified in deducing the inference from these conversations, which is sought to be drawn against the *factum* of the papers of April 28, and May 9. As to the answer made at that time by the testatrix, to the question whether the Logan will of the 8th of May was not her last will and testament, the legal effect of her saying "Yes" could not be to revoke the will of the 9th of May. A revocation cannot be established in that manner. As to the bearing of such a declaration upon the question of the *factum* of the paper of 9th of May, there might be something in it, had the testatrix been in a proper condition to comprehend what the altercation was about; but I am far from being satisfied that she was competent at that time. This was on the 12th of May, two days

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CAMPBELL vs. LOGAN.

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before her death. Mr. Jones states that she was "stupid, and had lost her reason mostly." Dr. Henxton thinks she "was able to understand all that took place at that time," that "she was not incapable of understanding; she gave correct answers to other questions; she was in her right mind;" though he previously said that "*for several days before her death she was not of sound mind,*" and he could not be "certain as to the state of her mind" *on the previous Friday*. If aroused, it is possible she might have been able to understand a question clearly put to her; but, even on that supposition, before drawing a conclusion from her answer, it should appear that the matter was distinctly explained. That does not appear, nor do the witnesses agree with each other as to her mental condition. The case, therefore, rests mainly on the legal propositions I have already discussed, and on the very explicit evidence of the witnesses, as to the *factum* of these instruments. I think they are sufficiently proved, and they must be admitted to probate, as, together with the will of the 8th of May, already proved, constituting the last will and testament of the deceased.

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BROWN vs. THE PUBLIC ADMINISTRATOR.

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*In the matter of the Estate of EDGAR CUTHBERT, deceased.*

BROWN vs. THE PUBLIC ADMINISTRATOR.

The statute directing judgments docketed, and decrees enrolled against the deceased, to be paid, according to their respective priorities, before bonds and other obligations, does not refer to foreign judgments, or to judgments recovered in the courts of other States.

A judgment recovered in another State, has no greater force, in respect to the distribution of the assets of a deceased person, than a foreign judgment. Neither at common law, nor under the statutes of this State, have judgments recovered in another State any title to priority of payment over simple contract debts. Creditors claiming on such judgments, must come in with the creditors of the deceased, described in the fourth class of the section of the statute, which prescribes the order in which debts shall be paid.

J. S. THAYER, *Public Administrator, in person.*

**THE SURREGATE.**—The deceased, at the time of his death, was indebted to the petitioners, Brown & Dimock, upon a judgment for \$405,08, recovered against him in the County Court of Craven County, in the State of North Carolina; and application is now made for an order for the payment of the judgment, as a debt entitled to preference under the statute directing judgments docketed, and decrees enrolled against the deceased, to be paid according to their respective priorities, before recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts. (2 R. S., 3d ed., p. 151, § 29.) The provision of the Constitution of the United States, that “full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings, of every other State,” and that Congress may “prescribe the manner in which such acts, records, and proceedings, shall be proved, and

## BROWN vs. THE PUBLIC ADMINISTRATOR.

the effect" thereof (*Const., Art. 4, § 1*), does not of itself, in respect to a question of administration, give any greater force or efficacy to a judgment recovered in another State, than belongs to a foreign judgment. For all purposes of administration, such judgments are to be considered as foreign judgments. Foreign judgments have no proper force of themselves here, except as *prima facie*, and perhaps, with certain exceptions, conclusive evidence of a cause of action. (*Cummings vs. Banks, 2 Barb. Sup. Ct. R., 602.*) In other respects, they rank only as simple contract debts. Assumpsit is maintainable on a foreign judgment. If such judgments are to be considered, in a strict and proper sense, judgments within the meaning of our laws, then they must have all the consequences of judgments; and if capable of being docketed here, bind lands, and rank as judgment debts in the distribution of the personal assets of deceased persons. It would also follow, as a consequence, that executors and administrators must, at their peril, take notice of such foreign judgments. That the provisions of our statutes relative to docketing judgments, and enrolling decrees, do not apply to foreign judgments and decrees, or judgments of other States, is obvious; and as judgments and decrees have no preference of payment unless docketed or enrolled, it is equally obvious that foreign judgments and decrees are entitled to no preference. But apart from this consideration, foreign judgments have never been held at common law to have any preference over simple contract debts. After the act of Union, it was decided that an Irish judgment had no force as a record in England; and Chief Justice Abbott, in discussing the question, said, "I have inquired of a very learned person, whether, in marshalling assets, it is considered to be entitled to priority as an English judgment, and the result of that inquiry is, that it is not." (*Harris vs. Saunders, 4 B. & C., 411-413; Othway vs. Ramsay, ibid., 414; See Duplex vs. De Roven, 2 Vern., 540; Walker vs. Witter, Doug., 1; Ferguson vs. Mahon, 11 A. & E., 179.*)

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ST. JULIO vs. DUNSCOMB AND BECKWITH.

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I am therefore of opinion that creditors on foreign judgments, and judgments of other States, are not entitled to any priority of payment, but must come in with the creditors of the deceased described in the fourth class of the section of the statute which prescribes the order in which debts shall be paid.

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*In the matter of the Estate of JACINTO TEXIDOR, deceased.*

In the case of a foreign will, it is the usage to grant administration with the will annexed to the attorney in fact of the foreign executor. If there be no one authorised to apply as such attorney, letters issue according to the statute, to the legatees, widow, and next of kin. The grant of administration is regulated by the law of the place where the assets are situated.

J. N. BALESTIER, *for Petitioner.*

T. SEDGWICK, *for Contestant.*

**THE SURROGATE.**—The attorney of the foreign executor, having presented for probate a foreign exemplification of the will, and a power of attorney, authorising administration with the will annexed, a resident debtor objects to the issuing of letters, on the ground that, by the law of the testator's domicil, Porto Rico, foreign assets cannot be collected by the executors without the special authorisation of the testamentary tribunal of the domicil, unless the will expressly authorises such collection. So far as there is any evidence of the existing law of Porto Rico on this subject, as I understand it, the want of authority in the executors to collect foreign assets without the sanction of the courts in Porto Rico, relates only to a collection of the foreign

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ST. JULIO vs. DUNSCOMB AND BECKWITH.

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debts without the intervention of administration. Our law goes beyond that; and, even with such a special authorisation, the executor cannot collect the assets here, unless he takes out letters. All this, however, is aside of the question of the grant of administration, which is governed by the law of this place, and not by that of Porto Rico. Administration with the will annexed, belongs, as a matter of right, by our statute, to the parties interested under the will, or the next of kin of the testator, in a certain prescribed order. It is true that, as a matter of comity, the custom has prevailed in this court, time out of mind, to grant letters to the attorney of the foreign executor; but if no such application be made, administration must go according to the statute. If the power now produced were insufficient, then I would have to treat the case the same as if there were no application on the part of the foreign executors, and grant administration under the statute; and in that view, the applicant being the husband of one of the residuary legatees, and all the other parties in interest being non-resident aliens, he would be entitled to letters, without claiming under the power.

But I think the power quite sufficient to justify administration, on the ground that the will authorises the collection of foreign assets. The will, in speaking of certain notes, requires the executors to "take the necessary steps to collect the same, as well as *all other sums which may be due*" the testator. It directs the executors "to present exact reports of what is found in money and in documents, for due record;" confers upon them "full powers, that after his death they may enter upon his property, and dispose of the moveable part thereof;" and expressly mentions in terms the testator's accounts with commercial houses in the United States.

Besides, the present motion relates merely to administration, and not to distribution; and if the objection be valid against the grant to the attorney of the executors, then legatees, next of kin, the public administrator, or

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HALL vs. McLAUGHLIN.

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creditors, may intervene. It is, I believe, universal law, that the distribution is governed by the law of the domicil, and the grant of administration by the *lex loci rei sitæ*. There can be no risk, therefore, in the debtor paying the administrator here. The administrator obtains his authority from the surrogate, and that affords protection to the testator's debtors resident here, according to the established rules respecting the administration of the estates of deceased persons, prevailing wherever the civil law governs. There seems, therefore, to be no reasonable ground for delaying the issuing of letters.

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*In the matter of the Estate of WILLIAM McLAUGHLIN,  
deceased.*

The testator devised certain property to his wife during her widowhood, until his youngest son should arrive at age, when he directed it to be sold by his executors, and the proceeds to be distributed as prescribed in his will. After sundry legacies, he gave "all the rest, residue, and remainder," of his estate to his wife absolutely. The widow having died, the assignee of parties entitled to legacies out of the proceeds of property devised to the testator's wife during her widowhood, cited the executor to account, claiming that on the death of the widow, the time designated for the sale of the premises had arrived—*Held*, that the direction to sell was *conditional*, and the legatees of the proceeds of the sale when made, have no claim until the power can be executed according to the provisions of the will. The time set for the execution of the power is, "when" the testator's youngest child should attain majority. A direction to convert realty into personalty to pay legacies, is not accelerated so long as the condition on which it is to take effect is capable of literal consummation.

DAVID HARRISON, JR., D. T. WALDEN, for Petitioner.

I. The petitioner is entitled to an account, he having a demand against the personal estate of the deceased, as

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HALL vs. M'LAUGHLIN.

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representing the shares of three sons, Nicholas, Alfred, and Henry, legatees. (2 *R. S.*, 3d ed., p. 155, § 55.)

II. The real estate, by the power of sale contained in the will, was converted into personal estate, and must be treated as such. (*Fletcher vs. Ashburner*, 1 *Bro. C. C.*, 497; *S. C.*, 1 *White & Tudor's Eq. Cases*, Law Library, vol. 49, pp. 546, 555, 6, and *American Cases*, 563 to 566; 1 *Jarman on Wills*, 529, 531; *Crary vs. Leslie*, 3 *Wheaton R.*, 564.)

III. The bequest to the sons was vested immediately on the death of the testator (2 *R. S.*, p. 9, § 13, 3d ed.; *May vs. Wood*, 3 *Bro. C. C.*, 471; 1 *Jarman on Wills*, 756; 1 *Roper on Legacies*, 431; *Tucker vs. Ball*, 1 *Barb. S. C. R.*, 94; *Sweet vs. Chase*, 2 *Comst. R.*, 73, per *Ruggles, J.*, p. 80.)

IV. The power of sale was to be executed upon the termination of the widow's estate. This is clearly the intention of the testator.

1. The estate of the widow was for life, determinable on her marriage, or upon the youngest son arriving at age.
2. The age of the youngest son is a limitation of the widow's estate, and not a period fixed for the sale.
3. There is no provision for a continuance of the estate after the death of the widow, until the child becomes 21, if she dies previous to that time.
4. There is no provision for the accumulation of rents and profits, during any intermediate period.
5. There is no provision for any interval between the termination of widow's estate and age of son.
6. It is the means provided by the testator for distributing his estate among the children.

V. Upon the conversion of real into personal estate,

## HALL vs. McLAUGHLIN.

the executor was entitled to receive the rents and profits for the benefit of the legatees of the residue upon such sale. (*Allen vs. De Witt*, 3 *Comst.*, 285, *per Pratt, J.*; 2 *Jarman on Wills*, 85; *Harris vs. Lloyd*, 1 *Turn. & Rus.*, 810; *Bullock vs. Stones*, 2 *Ves. Sen.*, 521; *Wyndham vs. Wyndham*, 3 *Bro. C. C.*, 58; 2 *R. S.*, 3d ed., p. 12, § 40.)

JOHN S. WOODWARD, for Executor.

I. The applicant is not entitled now to an account.

1. He is not interested in the personal estate.

2. His interest arises by conveyance or transfer from Nicholas, Henry, and Alfred A. McLaughlin, of their interests in the premises No. 115 Elizabeth Street.

3. The power to sell contained in the will is a naked power in trust, to be exercised on a certain event, and for a special purpose, to wit., for the distribution of proceeds of sale. No estate vests in the executors, and they are not entitled to the rents intermediate the death of the widow and the actual sale. (1 *R. S.*, 729, § 56; *Vail vs Vail*, 4 *Paige*, 317; *Germond vs. Jones*, 2 *Hill*, 569.)

4. The power of sale cannot be exercised by the executors upon the death of the widow, nor until the majority of the youngest child.

Such was the intention of the testator, as evident from the whole will.

The testator contemplated the event of the majority of his youngest child, and that it might happen before the death or remarriage of his wife. He makes her an executrix, and gives her a legacy out of the proceeds; and he gives it to her "upon my said son arriving at full age."

If the fee did not pass, with, also, the intermediate rents, to the general residuary devisee, or to the residuary legatees of the proceeds of sale, it passed to the heirs at law of the testator, subject to the execution of the power of

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HALL vs. McLAUGHLIN.

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sale. (1 *R. S.*, 729, § 56; *Vail vs. Vail*, 4 *Paige R.*, 317; *Wood vs. Keyes*, 8 *Paige*, 365; *Germond vs. Jones*, 2 *Hill*, 569; *Sharpsteen, vs. Tillou*, 3 *Cow. R.*, 651.)

In such case, the heirs at law, had, at law, a right to enter upon the land and to receive the rents and profits, and might maintain ejectment for the same until a sale or division shall be made. (*Lindenburger vs. Matlack*, 4 *Wash. C. C.*, 278; *Jackson vs. Scamber*, 7 *Cow. R.*, 187.)

If, as was suggested by the applicant's counsel, it was the intention of the testator to provide for the widow, it is plain that it was equally his intention that the power of sale, to effectuate that intention, should have been exercised in her life-time, and if not so exercised, then it could not be exerted at all. (*Jackson vs. Jansen*, 6 *John R.*, 73; *Sharpsteen vs. Tillou*, 3 *Cow. R.*, 651.)

The counsel also suggests another seeming difficulty in the way of any construction of the power of sale, as to the time of its execution, other than that for which he contends, by the question,—Suppose the youngest child dies before attaining his majority, when is the power to be executed, or what becomes of it?

We answer: The power may be exerted at once upon the death of that child. (*Hawley vs. James*, 5 *Paige*, 463; *S. C.*, 16 *Wend.*, 60; *Lang vs. Ropke*, vol. 10, *Legal Obs. No. 3*, pp. 70, 74.)

If this be not so, then the counsel suggests, that unless his construction be adopted, and the power could not be exerted upon the death of the widow, the testator's intention would be defeated by the death of the youngest child before his majority. If this be so, it cannot affect the question here; for the same result might happen if the testator had, without reference to his wife, or any other contingency, in plain terms directed that the estate should not be sold until the youngest child arrived of age; because, if the latter should die within that time, the intention, so far as concerned the legatees, would equally be defeated.

But in this case, the legacies are given to those who would be the heirs at law, and the only difference in result would be, that they would take the land in lieu of the legacies.

II. The land is not converted into personalty from the death of the widow.

The criteria which the authorities on the subject of conversion furnish, are these: whether the will has prescribed a sale absolutely and at all events, for all the purposes of the will—irrespective of all contingencies, and independent of all discretion. If the sale is made for a special purpose, or the general purposes of the will, and these purposes fail, conversion does not take place, or, *if to be made on a given event, it depends upon the occurrence of that event.* (*Wright vs. Methodist Church*, 1 *Hoff. C. R.*, pp. 202, 218, 219, and cases cited; 2 *Kent's Com.*, 7th ed., in note at p. 230; *Bunce vs. Vander Grift*, 8 *Paige*, 37, 40.)

The general rule is to date the conversion on death of testator, unless there is something special in the power of sale making its exercise or performance depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell or not. (*Arnold vs. Gilbert*, 5 *Barb. Sup. R.*, 190.)

III. The Surrogate has no jurisdiction to order an account of proceeds of land ordered by the will to be sold, until actually sold. (2 *R. S.*, 110, § 56, 2d ed., p. 47, § 57.)

The case of *Clark vs. Clark*, 8 *Paige*, 152, decides only that the Surrogate has authority to call executors to account for proceeds *after* sale made.

So, also, *Stagg vs. Jackson*, 2 *Barb. Chan. Rep.*, p. 86, affirmed in Court of Appeals, 1 *Coms.*, 206, which says the Surrogate may call executors to account for the proceeds, and for rents and profits *received by them previous to a sale thereof, under a power in the will* of the testator.

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HALL vs. M'LAUGHLIN.

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In that case the will authorised the executor *expressly* to receive the rents.

IV. The Surrogate has no jurisdiction to order the executor to sell real estate under a power.

The extent of the authorities is that a Court of Equity may make such order. (See *Van Vechten vs. Van Veghten*, 8 Paige, 128; *Arnold vs. Gilbert*, 5 Barb., S. C. R., p. 195, and 1 *Hov. Supp.*, cited; 1 *R. S.*, 734, §§ 94, 96.)

**THE SURROGATE.**—The testator made the following devise and bequest: "I hereby give, devise, and bequeath, to my dearly beloved wife, Sally Ann, my house and lot 115 Elizabeth Street, in the city of New York, with all my household furniture, to her during her widowhood, until my youngest son shall have arrived at full legal age, when I hereby direct the same to be sold by my executors, at private sale, or at public auction, in their discretion; and after paying from the proceeds of said sale the sum of five hundred dollars to my said wife, Sally Ann, provided she be my widow, sole and unmarried,—and which sum of five hundred dollars I hereby give to her from such sale, upon my said youngest son arriving at full age, and she my said wife remaining my widow; and after paying the sum of one hundred and fifty dollars from the proceeds of such sale to my daughter, Harriet, and which I hereby give to her; and after paying the sum of one hundred and fifty dollars from the proceeds of such sale, to my daughter, Zillah, and which I hereby give to her; I then hereby will and direct, that all the rest, residue and remainder, the proceeds of such sale be equally divided among my seven sons, &c., share and share alike, and which I hereby give, devise and bequeath, to them accordingly." After sundry legacies to his wife and children, he then concludes the will thus, "And, in the last place, I hereby give, devise, and bequeath, all the rest, residue, and remainder, of my

## HALL vs. McLAUGHLIN.

estate, not herein and hereby devised, to my said wife, Sally Ann, to her heirs, executors, administrators, and assigns, forever, hereby declaring that the aforesaid devises to my said wife are in lieu and instead of all dower," &c. His wife was nominated his executrix, and his son William executor.

The testator died in May, 1847, and his widow in November, 1848, leaving three of their surviving children minors, and who are still under age. The assignee of three of the parties entitled to legacies out of the proceeds of the house 115 Elizabeth street, has cited the surviving executor to account, on the ground that on the death of the widow the time arrived when the premises should be sold and the proceeds divided, according to the terms of the will. He also insists that the executor should account for the rents and profits from November, 1848, to the present period.

There is no devise of the land, or of the rents, to the executor; and the direction to sell, though positive and absolute, is conditional as to time, and is a mere power in trust, which does not break the descent. (2 *R. S.* 3d ed., p. 14, § 56; *Sharpsteen vs. Tillou*, 3 *Cowen*, 651; *Jackson vs. Schaubert*, 7 *Cowen*, 187; *Jackson vs. Winne*, 7 *Wendell*, 47.) Laying the power aside for a moment, the will contains an express devise to the wife during her widowhood, *until* the youngest son attain 21, and then there is no other disposition of the property, apart from the power, except the general residuary devise to the widow. If real estate be specifically devised, and the devise does not take effect from the incompetency of the devisee to take, or from a lapse by the death of the devisee in the testator's life-time, or from a partial revocation of the will, the property is excepted from the effect of the residuary clause, and descends to the heir at law. (*James vs. James*, 4 *Paige*, 115; *Van Kleeck vs. Dutch Church*, 6 *Paige*, 600.) But independent of the power, there is no other devise in the present will, except to the wife. There is no specified gift, or

## HALL vs. M'LAUGHLIN.

charge, which has failed, so that the heir could claim the benefit of the intended exception from the residuary clause, and of its failure as an invalid or ineffectual devise. But whether the devise to the widow during her widowhood, until the youngest son should attain 21, amounted to a term during his minority; or whether the widow's interest ceased under this provision on her death (*Carter vs. Church*, 1 Ch. Ca., 113; *Levet vs. Needham*, 2 Vern., 138; *Manfield vs. Dugard*, 1 Eq. Ca. Ab., 195, fol. 4); or, on the latter supposition, whether the estate passed to the heirs, or to the widow under the residuary devise, it is not now necessary for me to consider; for, the legatees of the proceeds of the real estate have no right to their bequests until the power can be executed, and it makes no difference to them who has the property while the power is in a state of suspense. The only question, therefore, is, whether the time has arrived for the execution of the power. This, like all questions arising on the construction of wills, is to be determined by the intention of the testator; and the intention depends upon the language of the particular provision in question, and a comparison of this with other clauses of the will, tending to illustrate and elucidate the general scope and object of the instrument.

The testator left his wife with three minor children; and in suspending the sale of the real estate till the youngest attained age, his general object was, probably, to provide for the minor children, which he sought to accomplish through the medium of their mother, to whom he gave the property during her widowhood and until the power could be exercised, and whom he also made residuary devisee. He does not, in terms, provide for the occurrence of the death of the mother during the minority of the children; but if she took the estate under the will, she could care for the interests of the minors; or if it passed to the heirs at law, the minors would still be protected. There might also be prudential reasons for withholding the power of sale until all the children were of full age, and were legally compe-

tent to look after their own affairs; for so long as the property remained in lands, the rights of the infants were secured. I see no reason, therefore, for giving any other interpretation to the clause vesting the power of sale in the executor, than may fairly be drawn from the very language used. There must be very clear evidence of a contrary intention, drawn from other parts of the will, to overrule express and definite words. The house is devised to the wife "during her widowhood, until my youngest son arrive at full legal age, *when* I hereby direct the same to be sold." To hold that the word "*when*" refers to the phrase "*during her widowhood*," instead of the immediate antecedent, "*until my youngest son shall have arrived at full legal age*," would be a palpable and violent transgression of the ordinary rules of language. If "*when*" is to be referred to "*during*," then the power could have been executed any time "*during*" his wife's widowhood, and that, certainly, was never intended. "*When*" is the proper correlative of "*until*," and fixes the event on which the power arises. It is true, the testator seems to have supposed his widow would be alive when that event would happen; and in that he is disappointed; but he has not provided for such a contingency so as to affect the power, and it cannot now be done, though it were a clear omission, which I am not satisfied that it was. What would be the effect of the death of the minors before attaining full age, it will be time enough to consider when that occurrence takes place. All that I am now properly required to decide is, whether the time specified for the execution of the power has arrived, and I am clear that it has not. There is a direction for an out and out conversion, but it is not immediate; and I am not aware of any principle or authority giving countenance to the idea that it can be accelerated, so long as the condition on which it hinges is still future, and capable of literal consummation. (*Sugden on Powers*, vol. 1, pp. 334-339; vol. 2, pp. 473-478; 25 *Wend.*, 224). The executors at present have nothing to do with the property or its rents, and are not

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TREAT vs. FORTUNE.

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accountable for that over which they have no control. The applicant, therefore, entirely fails in his case, and the petition must be dismissed. Under the circumstances, I shall not award costs against him. The costs of the executors will be paid out of the estate.

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## TREAT vs. FORTUNE.

*In the matter of the Estate of JAMES TREAT, deceased.*

In an administration suit, it is not the exclusive right of the executor or administrator to plead the statute of limitations, but that may be done by any party interested in the fund.

The claim of an executor or administrator against the deceased has no priority over the demands of other creditors.

An executor or administrator cannot retain assets of the estate in payment of his own demand, until it has been proved to and allowed by the Surrogate, which allowance can be made on citing the parties in interest, or on the final accounting.

The statute of limitations may be set up in bar to a demand of the executor or administrator when he proceeds to prove the same, as provided by statute.

A. H. DANA, for next of kin.

JAMES FORTUNE, Administrator, in person.

**THE SURROGATE.**—On the final accounting of the administrator, several objections were raised by the guardian of the next of kin. The most important of these related to a personal claim of the administrator against the intestate, for the expenses of an expedition to Texas, which is now for the first time presented, though the administrator has been called to account before.

The transaction occurred, as alleged by the administrator, between the 25th of January 1836, and the 3d of November 1838. Thirteen years expired before he presented

## TREAT VS. FORTUNE.

his demand for adjudication. The guardian of the next of kin, now sets up the statute of limitations against the claim. In an administration suit it is not the exclusive right of an executor or administrator to interpose the statute, but that may be done also by any other party interested in the fund. (*Shewen v. Vanderhurst*, 1 *Russ & My.*, 347; 2 *ibid.*, 75.)

(Previous to the Revised Statutes, an executor or administrator, a creditor of the estate, had a preference over other creditors whose claims were not superior to his in dignity; and he might accordingly retain the amount due him from the assets of the estate, and the statute of limitations could not be interposed in bar of the exercise of such a right of retainer) (*Rogers v. Hosack's Exrs.*, 18 *Wend.* 319. 6 *Paige* 426. *S. C.*) But the right of retainer, is so changed by the Revised Statutes, that the executor or administrator can no longer pay his own demand—nor can he retain part of the property of the deceased for that purpose, unless the debt has been proved to and allowed by the Surrogate, which allowance can be made on the proper persons in interest being cited, or on the final accounting. (2 *R. S.* 3d *ed.*, p. 152, § 35.) One of the objects of this alteration in the law was “an early exhibition of the administrator’s claims” (3 *R. S.*, 2d *ed.*, p. 642, *Revisers’ Notes*); and by the act of 1837, means were provided for enabling the administrator to bring in all the parties interested, even before the final accounting. The right of retainer, then, no longer exists, until the debt is established judicially by proper proof, the same as in the case of any other creditor; and a course of procedure is provided, tantamount to a suit, by which that end may be accomplished. As it is in the power of the executor or administrator to institute this proceeding at any time, I see no reason why the statute of limitations should not be applied to his demand, the same as to any other. In abolishing the right of retainer, the statute has also removed the reason why the statute of limitations could not be pleaded, by giving a mode of establishing the debt against the estate, without involving the absurdity of

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TREAT vs. FORTUNE.

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the administrator suing himself. Why, then, should he not establish his debt within the same period as other creditors are bound to do under the requisitions of the statute,—why, when he has legal process for that purpose at his command, should he be permitted to keep back his claim until the transaction has become old and stale? I can see no principle in the way of applying the statute to such a demand. The facilities afforded by the possession and control of the papers and documents of the deceased are such, that an administrator or executor should, of all persons, be called upon promptly to present his claims. The object of this statute was to lead to an early adjustment of his demands, and every consideration of policy is in favor of such a construction of the law as may conduce to that end. I have, therefore, come to the conclusion that, since the Revised Statutes went into effect, with the 37th section of Chap. 460 of the Laws of 1837, a remedy having been supplied by which the executor or administrator can at any time institute a *quasi* suit and establish his debt, the statute of limitations is applicable to his claim, and may be interposed by any parties interested in the estate. This view of the case precludes the necessity of expressing an opinion on the merits of the demand of the administrator; but I may add that, after a full examination, I do not think it sufficiently proved.

## APPLEGATE vs. CAMERON.

## APPLEGATE vs. CAMERON.

*In the matter of the estate of WILLIAM APPLEGATE, deceased.*

THE statute which directs the appraisers, on taking an inventory, to set apart for the use of the widow and minor children—in addition to certain specified articles—other personal property to the value of not exceeding one hundred and fifty dollars, does not vest an absolute discretion in the appraisers. They cannot set apart property exceeding one hundred and fifty dollars in value. The appraisers are officers appointed by the Surrogate to estimate and appraise; and their appraisement is not conclusive, but may be reviewed, examined, and corrected.

If the appraisers neglect to set apart property for the widow and minor children, or make a valuation palpably erroneous, whether from fraud or mistake, the Surrogate may direct the error or mistake to be rectified.

Where articles were set apart, valued at a sum exceeding one hundred and fifty dollars—*held* that the act was, on its face, a violation of the statute, and invalid.

G. G. SICKLER, *for Petitioner.*

D. B. TAYLOR, *for Administratrix.*

THE SURROGATE. In making the inventory, the appraisers set apart for the use of the widow and minor children the articles of household furniture declared by the statute not to be deemed assets, and also other articles of furniture valued by them at \$165 50. On the accounting of the administratrix, at the instance of one of the children, proof was offered that the appraisement of these articles was grossly incorrect; and it is now insisted that the widow and administratrix, in whose possession the articles still are, should have a new appraisement made, or answer to the petitioner for his share of the excess of their value beyond the sum of \$150. The language of the statute is: "Where a man, having a family, shall die, leaving a widow, or a minor

## APPLEGATE vs. CAMERON.

child or children, the following articles shall not be deemed assets, but shall be included and stated in the inventory of the estate, without being appraised." (2 *R. S.*, 3d ed., p. 147, § 9.) By Sec. 2 of Chapter 157 of the Laws of 1842, it was provided that "When a man, having a family, shall die leaving a widow or minor child or children, there shall be inventoried by the appraisers, and set apart for the use of such widow, or for the use of such widow and child or children, or for the use of such child or children in the manner now prescribed by the ninth section of Title Third Chapter Sixth of Part Second of the Revised Statutes, necessary household furniture, provisions, and other personal property, in the discretion of said appraisers, to the value of not exceeding one hundred and fifty dollars, in addition to the articles of personal property now exempt from appraisal by said section."

It is claimed by the administratrix, that the duty assigned by the statute to the appraisers is vested in them absolutely. I cannot agree to that proposition. The discretion given to the appraisers relates to the particular property set apart—that is, they may appropriate household furniture, provisions, or other personal property, in their discretion; but so far from having any power beyond this, they are expressly restrained by the limitation that the property so assigned shall not exceed one hundred and fifty dollars in value. It is true, they are to estimate the value; but their action is not judicial. They are officers appointed by the Surrogate to estimate and appraise the property; but the estimate and appraisement, when made, are not conclusive. Appraisers may be appointed "as often as occasion may require." (2 *R. S.*, 3d ed., p. 146, § 1.) The Court has always exercised a discretion over the inventory; and as to the value of the goods as reported by the appraisers, it never was binding at common law. In an action at law, the inventory is only *prima facie* evidence of the extent of the assets and their value, so as to throw the proof of errors and incorrect valuation on the party impeaching it. (4 *Burns, Ecc. L.*, 418,

## APPELGAATH VS. CAMERON.

420.) Our statute provides expressly that it may be rebutted. (2 *R. S.*, 3d ed., p. 544, § 14.) If the appraisers should neglect to set apart any property for the widow or minor children, or if, in discharging their duty, they commit error, the Surrogate has such a supervision of their proceedings that he may correct any irregularity, mistake, or improper valuation. Otherwise there would be no remedy; and to hold that appraisers may set apart property of any value without their valuation being subject to review, would open a wide door for fraud. There is no doubt the appraisers in the present instance acted conscientiously; but it is just as clear that, through inexperience or ignorance of the value of the property, they committed a serious mistake, and greatly undervalued some of the articles in question. Besides, it is obvious that on their own estimate of the value they have not complied with the provisions of the statute. Having appraised the articles at the sum of \$165 50, they entered on the inventory this memorandum: "The above are articles set apart for the widow, pursuant to exemption act, passed April 11, 1842—one hundred and fifty dollars in value." There is confessedly an excess in value, beyond the amount fixed in the statute, of \$15 50. That, of itself, makes the proceeding void. It will answer no purpose for the widow to pay this excess; for that leaves open, what articles belong to her as purchaser and what articles are set apart, so that the severance of the property from the estate, and its specific allotment remain entirely incomplete. An appraisement or apportionment that shows the statutory limit to have been transgressed by setting apart more than one hundred and fifty dollars, in value, of property, is on its face invalid. The administratrix must, therefore, on this accounting, respond to the petitioner for one-third of the excess of the value of these articles over the sum of one hundred and fifty dollars.

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SKIDMORE vs. ROMAINE.

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## SKIDMORE vs. ROMAINE.

*In the matter of the Real Estate of BENJAMIN ROMAINE,  
deceased.*

WHERE necessaries are furnished to a person of weak or impaired capacity, and no fraud or imposition is practised, a debt is created which on his decease will be a charge against his estate; provided the articles furnished were suitable to his circumstances pecuniary and social, and to his ordinary mode and habit of living.

Where a creditor has sued the executors, and on their offer to permit a recovery for a certain sum, has taken judgment for that amount, the claim is liquidated, and he cannot recover a larger sum in a proceeding to sell the real estate of the deceased for the payment of his debts.

The personal estate is the primary fund for the payment of debts, and the measure of recovery against the realty cannot exceed that against the personalty, though it may be less.

On application to sell the real estate of the deceased for the payment of his debts, the devisees or heirs may set up the statute of limitations against the claims of creditors.

Whether, when a cause of action has accrued, and the statute commenced running, and the debtor dies within the six years, it is an answer to a plea of the statute, that by reason of litigation as to the probate an executor was not appointed until the six years had expired, and that suit was brought within a reasonable time after probate granted, *quære?*

An application for the sale of real estate for the payment of debts is not, in a strict sense, an action. The term of eighteen months after the death of a testator or intestate forms no part of the time limited by law for the commencement of an action against his executors or administrators; and an action for the debts of the deceased cannot be brought against his heirs or devisees within three years from the time of granting letters.

Proceedings to compel the sale of the real estate for the payment of debts, cannot be instituted by a creditor until the executor or administrator has accounted; and an account cannot be compelled till the lapse of eighteen months after letters issued.

Where on the decease of the testator the statute of limitations had commenced to run against certain simple contract debts, and in consequence of a contest as to the probate, letters testamentary were not

## SKIDMORE VS. ROMAINE.

granted until five years after, and the six years from the creation of the debt expired after letters were issued, but before the creditors could compel an account,—Held, that the claims were not barred by the statute of limitations.

In proceedings to sell the real estate for the payment of debts, it is competent for the heirs or devisees to show that the personal estate has not been applied to the payment of the debts: but the sale may be ordered by the Surrogate, if he has satisfactory evidence that the executor or administrator has proceeded with reasonable diligence in making such application.

Executors will not be required to sell leasehold premises, on which the testator has erected a private vault, in which he was interred, and in regard to which special directions were contained in the will,—before the real estate can be sold for the payment of debts.

Whether specific legatees, whose legacies are encroached upon for the payment of debts, are entitled to have the assets marshaled against devisees, *quære?*

Where the personal estate that had come to the hands of the executors was insufficient for the payment of all the creditors, and there were controverted questions between the legatees and devisees necessary to be determined before ascertaining whether the personal estate was sufficient to pay the debts, and the executors had in their hands rents of the real estate collected during the contest as to the probate,—Held, that the debts might be paid out of that fund; the legatees and devisees being left to the settlement of their respective rights and claims in a court of competent jurisdiction.

R. MOTT, W. BLISS, A. H. CORNING, R. BENNER, L. B. SHEPPARD,  
C. H. SMITH, *for Creditors.*

W. ROMAINE, A. BOARDMAN, *for Executors.*

H. M. WESTERN, *for Devisees.*

THE SURREGATE.—Benjamin Romaine departed this life 31 January, 1844. A contest arose on the probate of his will and the codicils, which continued for several years, so that letters testamentary were not issued until 27 January, 1849. A collector was appointed 15 February, 1844. The executors having qualified, they were cited to account at the end of eighteen months by some of the creditors; and, it appearing that the personal estate was insufficient to pay the debts, application was made to mortgage, lease or sell the real estate for that purpose.

Most of the claims presented for my adjudication in

## SKIDMORE vs. ROMAINE.

this proceeding, are for groceries, furniture, coal, merchandise, and other articles for household or domestic use ; and the evidence of sale, and delivery at the testator's residence, and on his order, is such as would ordinarily be sufficient to establish his liability. It was contended, however, that the testator was not at the time possessed of sufficient capacity to make a valid contract.

With several of these parties the deceased had been in the habit of trading many years ; and if his mind was impaired at the period of these particular transactions, there is, with perhaps one exception, no evidence of the fact being actually brought home to the knowledge of the claimants. But even a lunatic is liable for necessities suitable to his degree or condition in life. (*Browne vs. Jodrell*, 3 *Car. & P.*, 30 ; *Baxter vs. The Earl of Portsmouth*, 2 *Car. & P.*, 178.) In *Wentworth vs. Tubb*, before Lord Lyndhurst, the creditor of a lunatic instituted suit for payment out of the real estate, there being no personal assets. The heir set up the lunacy ; and the Lord Chancellor held that "where necessities are furnished to a lunatic, and no fraud or imposition is practised upon him by the party furnishing them, the lunatic is bound to pay for them as being a debt due from him to such party ; and if a debt upon his decease, his estate is chargeable with it." (1 *N. Y. Legal Observer*, 282.) That case is precisely in point, in many of its features, with the present one, except that I do not think the proof shows the testator to have been *non-compos*, or wholly deprived of reason, at the period these debts were contracted. It may very properly be said that his mind was impaired so as to make him the subject of imposition or undue influence. There is not enough to establish an absolute and entire incapacity to contract. But under either supposition, he was chargeable for necessities suitable to his circumstances, pecuniary and domestic, his rank in life, and his ordinary mode or habit of living.

It appears that the testator's daughter, Mrs. Nichols,

## SKIDMORE vs. ROMAINE.

and her children, resided with him previous to his decease. She went to Europe in October, 1842, and returned in September, 1843, at his request, to nurse and attend him. With her two sons she continued to reside at his house, during the period the debts in question were contracted. The testator being old and infirm, she managed his domestic affairs. Her husband being insolvent, her children were taken in charge by their grandfather, and were supported by him; they all, in fact, for the time being composed part of his household, and this seems to have been well known and understood in the family. These circumstances explain many items in some of the present demands, which evidently relate to articles procured for the use of the testator's daughter and her children. But, with a single exception, there is no proof that the testator furnished the articles were cognizant of the particular use to which they were put, or had reason to suspect anything improper. The goods were sold and delivered at the testator's residence, in the ordinary course of business, and, for the most part, by persons with whom he had previously dealt. The carpets and furniture were in actual use in his house, and formed part of his estate, at the time of his death. The coal, some of the clothing, and a large proportion of the groceries and provisions were in the strictest sense, necessaries. To hold, under such circumstances, without any evidence of fraud or imposition on the part of the vendors, that the deceased was not liable, would, in my judgment, be grossly inequitable. I must therefore find generally, in favor of all the demands except that of Buttle. Buttle was in the habit of seeing the testator frequently. His account contains many charges, for borrowed money, wines, cigars, &c., which, with his knowledge of the family of the testator and his condition, he should have hesitated to furnish. It is true that most of these items occur previous to 1 Nov., 1843, when a settlement was made, part of the account paid, and a note given for the balance. But that note forms part of the

## SKIDMORE vs. ROMAINE.

present claim, and its consideration may be inquired into. Besides, Buttle brought suit against the executors, and on their offer under the code to permit a recovery for \$750, consented to take judgment for that amount. He thus liquidated his claim against the personal estate at that sum; and though the judgment is no evidence against the devisees, still it estops the judgment creditor, for it would be an anomaly to allow a greater debt against the real estate than can be demanded or has been established against the personal representatives. The personal estate is the primary fund, and the measure of recovery against the realty cannot exceed that against the personalty, though it may be less. Without going into particulars, I am satisfied that the amount for which Buttle consented to take judgment against the executors, was quite as much as he was entitled to, on a fair or even liberal adjustment of his account; and I shall therefore allow his claim at \$750, with interest from the date of the judgment.

It is however insisted, on the part of some of the devisees, that all these demands are barred by the statute of limitations. The statute may be set up by the devisees. (2 *R. S.*, 3d ed., p. 165, § 13.) As against all the claims, except one, the statute had begun to run at the testator's death; but for five years there was no representative of the estate, letters testamentary, in consequence of the probate being litigated, not having been issued till January 27, 1849. In *Rhodes vs. Smethurst*, 4 *Meeson & Welsby*, 42, it was held, after an elaborate argument in the Court of Exchequer, that when a cause of action has accrued and the statute commenced running, if the debtor dies within the six years, it is no answer to a plea of the statute, that by reason of litigation as to the probate, an executor was not appointed until the six years had expired, and that suit was brought within a reasonable time after probate granted. It is not necessary for me to express an

opinion on the point thus determined, there being another answer to the plea of the statute in this case.

The statute of limitations, in terms, applies only to *actions*, and requires the action to be brought within a certain period after the cause of action accrued. An application for the sale of real estate is in no strict sense an action, nor can the original cause of action against the deceased be said to *survive* against his heirs or devisees, as respects this peculiar form of proceeding. As an action proper, it survives only against the executor or administrator. In providing a statutory remedy for the sale of real estate for payment of debts, the proceeding is not likened at all to an action. Suits at law and in equity may be brought against the personal representatives or against the heirs or devisees, and these are proper actions. But the term of eighteen months after the death of any testator or intestate forms no part of the time limited by law for the commencement of an action against his executors or administrators (2 *R. S.*, 3d ed., p. 544, § 8); and an action for the debts of the deceased cannot be brought against his heirs or devisees, within three years from the time of granting letters. (2 *R. S.*, 3d ed., p. 171, § 57). It is obvious, therefore, that at the time this proceeding was instituted, an action against the executors would not have been barred by the statute, and that if the devisees were sued at law at this day, they could not successfully interpose the statute.

Again, the devisees cannot be made liable unless it shall appear that the personal assets of the deceased were insufficient to discharge his debts, or that after due proceedings before the Surrogate and at law, the creditor has been unable to collect his demand from the personal representatives; and it is incumbent on the creditor to establish these facts affirmatively (2 *R. S.*, 3d ed., p. 547, §§ 33, 36, 56, 59). But executors and administrators cannot be compelled to account until eighteen months after letters issued; and it is therefore entirely beyond the power of the creditor to

## SKIDMORE vs. ROMAINE.

ascertain until the lapse of that time, the insufficiency of the personal estate. For this reason, the creditor is not clothed with the right to apply for the sale of the real estate until an account has been rendered; and the result is, this proceeding cannot be instituted until eighteen months after the grant of letters (2 *R. S.*, 3d ed., p. 155, § 55, page 170, § 52). In January, 1849, when the executors of Mr. Romaine qualified, none of these debts were outlawed. The statute prohibited any resort to the real estate for the purpose of paying them until the expiration of eighteen months. It would be an extraordinary state of things if the time thus lost to the creditor by direct statutory prohibition should be counted against him, to the destruction of his claim. Laws are not to be construed in such a pernicious way, unless from stern necessity. As a general rule, when a temporary incapacity to sue grows out of a statutory provision, the time of such temporary disability should be excluded from the computation. (*Trecothick vs. Austin*, 4 *Mason*, C. C. R. 16. *Dowell vs. Webber*, 2 *Smedes and Marsh*, 452. *Montgomery vs. Hernandez*, 12 *Wheaton* 129; 2 *Martin*, N. S. 422). The creditors here, never had a right to proceed against the real estate until an accounting was had—that could not be had until eighteen months after letters granted—and here was a clear statutory suspension of the remedy from the testator's death to July, 1850, when the executors were called to account, and this proceeding was shortly after commenced.

If, therefore, this application is to be considered in itself as a *quasi* action, and the statute be directly applied to it, then either the cause of action never accrued against the devisees until eighteen months after letters granted, or in another view it was suspended for the period of eighteen months after probate, during which, though the estate was represented, the statute forbade the procedure.

The latter view is, I think, the true one, and harmonises with the provision that the period of eighteen months after the death of the testator or intestate shall be excluded

from the time limited for the commencement of actions against the executor or administrator. "There may be cases," say the Revisers, in recommending this section, "where there is no representative of a deceased person, against whom an action may be brought. It is but just, that during this period of suspense the creditor should not lose his rights, by having the statute of limitations attach on his demand. The term of eighteen months has been selected as a reasonable time, because the executor is allowed one year to settle the estate, and a short time should be added for the delay that may occur in the proving of a will or taking out letters." (3 *R. S.*, 2d. ed., p. 751.)

The obvious design of the law has been, not to drive parties to an immediate action, to save the statute, when public policy requires a reasonable period for the adjustment of the estate. For the attainment of this end, eighteen months were allowed the executor or administrator to render his account; eighteen months were allowed the creditor to bring his action, without having the statute run against him; and eighteen months were allowed heirs or devisees, before they could be called upon to pay the debts out of the real estate. All these provisions are consistent, harmonious and systematic, and point to a general plan, the prominent feature of which is the period of eighteen months, during which the estate might be quietly left in process of settlement, and at the same time the rights of creditors be unimpaired by the lapse of the time during which they were thus suspended. I must therefore determine that none of the claims in question are barred by the statute of limitations.

On an application of this kind, it is competent for the heirs or devisees to show that the whole of the personal estate has not been applied to the payment of the debts; and the Surrogate can make no order for the sale of the real estate, until he is satisfied that the personal estate is insufficient. But the order may be made, "although the whole of the personal property of the deceased which has come to the hands of the executor or administrator has not been

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SKIDMORE vs. ROMAINE.

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applied to the payment of debts," if he has "satisfactory evidence that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to payment of debts." (*Section 18.*)

The only amount of moneys collected by the executors is the sum of \$410.04, received by them from the collector, and a large sum paid to them by the order of the Supreme Court, the proceeds of the rents of the real estate collected by a receiver during the litigation of the proof of the will and codicils. The furniture of the testator never came into the actual possession of the collector or the executors, but was retained by Mrs. Nichols, as a legatee thereof, under the 5th codicil to the will. The testator in his lifetime made various loans or advances to his children, sons-in-law and grandchildren, most of which were released by a provision in the will to that effect. Three thousand five hundred dollars, advanced by him to Mrs. Nichols and her husband, were by two codicils charged upon her share of the estate. For two thousand dollars of this amount, the testator took the notes of Mr. Nichols; but those notes do not appear to have been found by the executors, or to have come to their possession. The testator was the owner of leasehold estate at the Wallabout, upon which there was a vault, where he directed his body to be interred, saying, "My executors are well acquainted with my views on this subject; and I therefore, in carrying out such views, and in trust for such purpose, vest in them the title to a piece of ground, where said vault now stands, thirty feet on Jackson street, and sixty feet deep, which they will see enclosed for that purpose." These dimensions do not cover the entire premises, but leave a part of the lot, twenty-five feet on Jackson street, upon which stands a frame building, leased by the testator. The will directs the executors, for the purposes of distribution, to sell the real estate, and then proceeds to divide all the property, real and personal, into six shares, which are distributed among the children and grandchild-

## SKIDMORE vs. ROMAINE.

dren. The direction to sell, is restrained by a provision that, in this particular, the executors shall be governed by the opinion of "the majority of the heirs," and shall in no event make sale "without such approbation."

It will thus be readily seen, that there is here abundant room for controversy, as to whether the personal estate is insufficient, and whether the executors have proceeded with reasonable diligence in converting the personal property into money, and applying the same to the payment of debts. If the payment of the debts is to be stayed till all these questions are settled, it will not only be a hardship to the creditors, but prejudicial to the interests of all parties interested in the estate.

As, by the will, the residuary personal and real estate is all thrown into one fund, and the same persons are interested to the same extent in the realty and the personalty, no inequality will be produced, so far as the leasehold premises at the Wallabout are concerned, if the debts be paid out of one fund instead of the other. And as part of those premises is dedicated by the will to special objects of a sacred character, I do not feel inclined to disturb the disposition of that property. (*Wood vs. Vandenburg*, 6 *Paige*, 277.) It is expressly provided by law, that "land set apart, and a portion of which has been actually used, for a family or *private burying ground*, shall not be subject to levy and sale by any execution or *other legal process* whatever;" and although the conditions under which this exemption can be claimed as against creditors, have not been complied with in this case, I consider the principle as recognised by statute, and certainly one that ought to be sacredly observed by devisees and legatees. (*Laws* 1847, *ch.* 85., § 1.) The claim against Mrs. Nichols constitutes part of the personal estate, and I suppose the recital and terms of the codicils are binding upon her (*Robinson vs. Bransby*, 6 *Madd.*, 348); but the notes not having been found, and the demand not being recoverable except out of her share of the estate, it is plain that nothing could be collected unless by suit, and that proba-

## SKIDMORE vs. ROMAINE.

bly a litigated one. Indeed, the only security for the debt is her interest in this very real estate.

The furniture bequeathed to Mrs. Nichols and the debts released to the children, sons-in-law and grand children, are all assets, and the respective parties are specific legatees. (*Rider vs. Wager*, 2 P. Wm., 331.) But aside from the question whether the debts are outlawed, these parties, as specific legatees, according to the former rule in equity, in case their legacies were encroached upon for the payment of debts, would be entitled to have the assets marshalled against the devisees, so that the devisees and specific legatees should contribute to the payment of the debts in proportion to their respective gifts. (*Long vs. Short*, 1 P. Wms., 403; *Tombs vs. Roch.* 2 Coll., 490; *Gervie vs. Gervie*, 14 Simons, 654; *Aldrich vs. Cooper*, 8 Vesey, 396.) I understand the whole system of marshalling assets in such cases to be broken up, except as provided by the Revised Statutes, which undertake to point out the order in which the several funds shall be liable; viz., first, the personal estate, secondly the real estate descended, and thirdly, the real estate devised. (2 R. S., 3d ed., p. 547, § 32, p. 550, § 56.) I am not aware, however, that this point has met with judicial consideration.

It is obvious, then, that the personal estate which has actually come to the hands of the executors is insufficient for the payment of the debts. I am not satisfied that the prosecution of any of the claims just considered, would have resulted in any speedy collection of assets for the payment of these creditors; nor do I think that just demands should be postponed to abide the issue of such litigated claims. The fund in the Trust Company is amply sufficient for the payment of the debts. It is only drawing three per cent., while the debts are earning seven. A few years of delay under such circumstances would be ruinous. It was ordered by the Supreme Court to be paid to the executors, probably for the very purpose of administration. If, under the idea that the will effects an equitable conversion of the

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MOWRY vs. SILBER.

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real estate into personal estate, it be regarded as personalty, there is no impropriety in applying it to the payment of debts. If it be regarded as the proceeds of rents of the real estate, still, as I have power to order the real estate to be leased, it' would be grossly improper to order rents to be raised in that way, when rents are already in the hands of the executors sufficient to discharge every debt. If the charge of \$3,500 on Mrs. Nichols' share of the estate be recoverable, or if the specific legacies should be applied to the payment of the debts, without contribution from the devisees, the effect of applying the rents in the hands of the executors, to the discharge of these claims, will be to subrogate the devisees to the rights of the creditors; and all these embarrassing and complicated questions can be determined in a court of competent jurisdiction, when partition of the estate comes to be made. There is no reason why the creditors should await this result; and, as a course most beneficial to all parties concerned, I must order the payment of the debts by the executors out of the funds in their hands, deposited in the Trust Company.

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MOWRY vs. SILBER.

*In the matter of proving the last will and testament of  
MARTIN SILBER, deceased.*

If the will has been attested by strangers, evidence of the signature and handwriting of the testator may be resorted to, for the purpose of shewing his identity with the party executing the will.

The decedent was seventy-five years old, his mind and memory were impaired, and though he was not legally incompetent to make a will, it was held that a testamentary disposition of his property ought not to be sustained, unless proved to have been fairly made,—to have emanated from him of his own free will, without the interposition of others,—and to have accorded with his intentions otherwise expressed, or implied from the state of his family

## MOWRY vs. SILBER.

relations. It is not enough in such a case to show that instructions were given by the testator, especially where he was so situated that the instructions may have been procured by undue influence.

An unequal will, executed by a person weak in mind and body, at the house of the party most largely benefited,—the execution not communicated to the children of the decedent, and the provisions of the will not being in harmony with his previously expressed intentions and dispositions—*Held*, that the ordinary presumptions flowing from the act of formal execution did not obtain; that the burden was thrown on the party seeking to establish the testamentary act of proving that precautions were taken and explanations had to secure to the testator the full and free action of his impaired faculties, and that in such a case the order of proof was reversed, and it should be shown affirmatively that no imposition was practised. Will *rejected*, on the ground that the proof was deficient in not affording such satisfactory evidence as the circumstances demanded.

J. H. HEDLEY, for *Executor*.

I. The identity of the testator as the person who signed, sealed, published, and declared the instrument offered for probate as his last will, is proved both by the subscribing witnesses to the will, as also by Hawkins, Mrs. Beckwith, and Mr. Shirley, witnesses for respondent, and by Mrs. Harsen and Anna B. Shradly, and other witnesses of contestant, who show collaterally where the testator was during this period, the room he occupied, and his death in and the removal of his corpse from the house of Mr. Mowry. If it was not Martin Silber who signed the will, who was it? (*Rutherford vs. Rutherford*, 1 *Denio*, 33; *Brinckerhoof vs. Remsen*, 8 *Paige*, 488; *Remsen vs. Brinckerhoff*, 26 *Wend.*, 825; *Chaffee vs. The Bap. Miss. Convention*, 10 *Paige*, 85; 1 *Sand. Ch. R.*, *Grant vs. Grant*, 235.)

II. The soundness and capacity of testator's mind, are proved by the *positive evidence* of witnesses who had business with testator up to and until after his removal to Newark. On the part of proponent, the witnesses *never had a doubt* of competency, or supposed weakness, except Mrs. Reed; and on the part of the contestants, the witnesses differ and disagree, or speak from a knowledge

## MOWRY vs. SILBER.

totally inadequate, their evidence being mere opinions from slight conversations with the testator.

III. Undue influence cannot be inferred from the evidence in this cause.

1. Because the testator intelligently gave directions himself for the will, having used no mouthpiece or medium. Mr. Mowry was a *spectator*, but gave no directions. He used no menace, *nor did he act*, or volunteer to act as interpreter.

2. It does not appear that any secrecy was used. Mrs. Rogers was away, but had been absent for ten or twelve days. Theresa was then in Newark, in attendance on her father. *This must have been so. Why? Because they kept no servant*, and Mrs. Mowry was in "*a delicate state of health*," and could not attend him. The duties of a sick room could not have devolved upon her in that situation.

3. If menace or persuasion had been used, the testator had his faculties, and would have mentioned the subject to Theresa, Mrs. Rogers, Mrs. Harsen, or other members of his family, in the interval between its execution and his death. There can be no doubt of it. He had abundant opportunity to reveal it, if he had chosen. Mr. Mowry was from home all day, except Saturday and Sunday, and yet Mr. Silber never lisped a word! "*Children and fools tell the truth.*" The contestants contend that here was "second childhood." And yet such must have been the complete subjection of this poor old man, that his mouth was sealed. He dared not tell. This conclusion is unreasonable and inconsistent with human nature, or the facts presented in this cause.

IV. The positions taken by the counsel for the contestants are denied, each and all of them, as unwarranted, specious, and unsound. The law as settled, cited in the argument, is quite sufficient to establish the will as being the last will and testament of Martin Silber, deceased.

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MOWRY vs. SILBER.

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P. REYNOLDS, *for Heirs.*

I. The evidence to prove the execution, by the *deceased*, of the paper propounded for proof is insufficient.

1. Although the deceased occupied the room in Mowry's house described by the witnesses to the pretended will which was executed by somebody in that room, and although the deceased died in that room, neither of the witnesses were acquainted with the deceased, or could say that it was *Martin Silber* who executed the instrument, except from the statement of Mowry.

2. In a case where there is ground to suspect fraud or imposition in obtaining the execution of an instrument *as a will*, the person who offers it for probate should be held to show *clearly and conclusively* its execution *by the deceased*, and not leave the Court to mere inference and conjecture on the point.

3. The proof in regard to the handwriting of the deceased ought not to be considered in the decision of the question of *identity*, as this is not a case coming within the provisions of the statute where evidence as to handwriting is admissible.

II. The instrument, if executed by the deceased, was not executed as the statute requires, to entitle it to probate.

1. Each of the *four* requisites prescribed by the statute for the due execution of a will must be clearly shown to have been complied with. They are not *one* act, but each should be a separate and independent act, and such was manifestly the intention of the Legislature. Neither of the witnesses to this instrument comes up to the letter or spirit of the statute in regard to its execution.

2. The mental and physical condition of the deceased at the time this instrument is alleged to have been executed by him, taken in connection with the other facts of the case, are sufficient cause for any court to hold the party

## MOWRY vs. SILBER.

seeking to prove this instrument to a strict compliance with the spirit and letter of the law on this subject.

III. If the instrument was executed by the deceased, and with the formalities necessary to the execution of a last will and testament, its execution was procured by *undue influence*, and from interested motives, on the part of Mr. Mowry, named therein as executor.

Undue influence is fairly inferable—

1st. From the will being, in its principal provisions, contrary to the intention of the deceased, expressed at all times previous to the time when the lawyer was brought by Mr. Mowry to his house to receive instructions for drawing the will.

2d. From the fact that no evidence is given to shew a change of intention, or to afford reasonable ground for supposing such a change.

3d. From the fact that the provisions of the will are *unequal, unnatural*, and unreasonable.

4th. From the advantage Mowry derived in having the control of the property, in addition to the benefit he derived by the devise to his wife.

5th. From the weakness and imbecility of the body and mind of the deceased.

IV. The deceased was under restraint from Mr. Mowry at the time of the execution of the instrument, and hence it is not the *will* of the testator.

The executor is bound to make out affirmatively, by *proof*, in the language of § 14 of Title 1 of Article 1 of Chapter VI. of Part II. of the R. S., 3d ed., p. 120, "that the will was duly executed," and "that the testator, at the time of executing the same, was in all respects competent to devise real estate, and *not under restraint*."

The presumption of *restraint* is strong—

1st. From the fact that the deceased, at the time of the execution of this instrument, was very feeble in body, on

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MOWRY vs. SILBER.

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account of age, infirmity, and protracted illness, and very weak and imbecile in mind, liable to be easily influenced and imposed upon, if not legally incompetent to make a will.

2nd. From the fact that the instrument was made and executed without the knowledge of any child or relative of the deceased, and with no relative, friend, or acquaintance near him to guard him from fraud, and protect him from imposition and fear, except Mr. Mowry, who was deeply interested in procuring the execution of the will, and who procured it to be drawn, and paid the expense; and

3rd. From the fact that the execution of this instrument took place in the house of Mr. Mowry, at a time when the nurse of the deceased, Mrs. Rogers, was absent, and when he was under the entire control of Mr. Mowry, liable to be operated upon by promises and threats, and not in the enjoyment of that freedom which the law contemplates should be enjoyed to make a valid will.

V. The execution of the instrument was procured by fraud on the part of Mr. Mowry, and it is therefore void.

Although there is no positive evidence of fraud, the presumption of it is so strong, that the executor is bound to rebut the presumption by evidence, which he has not even attempted to do.

The facts from which the legal presumption of fraud arise are—

1st. The clandestine manner in which the execution of the instrument took place.

2nd. From the imbecility of the mind of the deceased when this instrument was executed, rendering him liable to imposition, and to be easily influenced—being incapable, in the opinion of those who knew him best, to make a will, and utterly unfit to transact any business.

3rd. From the fact that if the will is established, Mrs. Mowry will receive as much of the deceased's property, exclusive of the gore lot devised to Theresa, as the aggre-

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MOWRY vs. SILBER.

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gate amount of the several legacies bequeathed his other five children, and that no reason has been given for this difference so unfavorable to the other children, particularly to Theresa, a helpless child, and Mrs. Rogers, an invalid and widow.

4th. From the fact that Mowry is made sole executor, to the exclusion of the sons of the deceased, particularly Frederick, on whom he seemed to rely to do justice to all.

**THE SUREGATE.** This will was opposed by all the adult children of the deceased, except Mrs. Mowry, the wife of the executor, by whom it was propounded. The grounds of contest were, insufficient proof of due execution, and of the identity of the decedent; and that the will was obtained from the deceased, while in a state of impaired and debilitated mind, by means of undue influence.

In regard to the execution, I think all the proper formalities were observed; and though the witnesses were strangers to the decedent, yet there seems to be no just reason for doubting that the person who executed the will was Martin Silber. The proof of the signature by persons familiar with his handwriting is conclusive on that point, and instead of there being any objection to resorting to evidence of handwriting for such a purpose, it seems to me eminently proper in a question of identity to invoke that class of evidence.

In order to determine the other branch of the case, a large variety of circumstances must be considered.

The deceased was a German by birth, and spoke the English language with difficulty. He had retired from business, and during the last few years of his life his faculties became impaired; and after the death of his wife, which occurred in June, 1850, he gave himself up to grief and despondency. He had six children, three of whom lived with him at his residence in 16th street until the end of the month of April, 1851, when the family was broken up, and he went to the house of his son-in-law, Mr. Mowry,

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MOWRY vs. SILBER.

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in Newark, New Jersey. There the will was made, on the 14th of June, and there the decedent died three months afterwards, in the seventy-sixth year of his age.

Mr. Whitehead, one of the witnesses to the will, and the professional gentleman who drew it, states that he received his instructions from the decedent in person; and at a subsequent interview attended the execution of the will. He found him in bed apparently sick, and says, "I was particularly struck with the clear and, as appeared to me, perfectly sane mind of the testator. No testator that ever executed a will in my presence ever exhibited more signs of sanity than Mr. Silber. I observed no signs of defect of memory or understanding. I could not judge whether his memory was good or not, as I had no means of judging, except this transaction." "Decedent expressed himself very clearly and intelligibly as to the provisions of the will. I was particularly struck with it." "He was feeble. Had to be helped to rise out of bed when he signed the will. Mr. Price and Mr. Mowry both assisted him to the edge of the bed. He did not get out, but sat on the edge. He wrote his name with some difficulty. His hand was tremulous and feeble. Soon as he had signed his name, he was immediately put back in bed." Mr. Price, the other subscribing witness, states that the decedent "appeared to be rational and collected;" but he says, "I had no means of judging of his mind except what was then said. When I asked him how he was, he said, Very feeble, and he did not expect to live long. He was quite feeble." Doctor Pennington, who visited the deceased on the 9th and 10th of June, says, "I found him very weak at my first visit." "He was always in bed. He was very feeble." "I should think his mind was sound. The question never occurred to me as to there being any want of intellect. I had no conversation with him beyond inquiries as to his symptoms." "I discovered no traces of depression but what I could account for from his physical disease. He died of that disease. I saw no evidences of mental derangement, and

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MOWRY vs. SILBER.

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had no suspicion of it. My attention was not directed in that way." "If there had been any alienation of mind, I think I should have discovered it."

Mr. Reed, who lived next door to the decedent for eight or nine years, states that he was in the habit of visiting at his house until a year ago last winter. He says: "I think he was a man of ordinary mind, so far as I was capable of judging. I saw nothing to make me think differently." "I should think he was mentally capable of transacting ordinary business." "I never noticed anything strange or extraordinary in his language or conduct, or anything that led me to suppose his mind was weak or imbecile. I saw him occasionally after his wife's death. That seemed to make an impression on him. He talked a great deal about it. That is the only difference I noticed." "He conversed sensibly, as far as I was capable of judging."

Mr. Denham, who knew the decedent, and saw him occasionally for ten or twelve years before his death, says: "Shortly after his wife died he came to my office." "I think the subject of his conversation then was the death of his wife. That was pretty much all he talked about. He appeared to be much grieved about it. He expressed himself very feelingly. I did not notice that he was not altogether himself." "I considered him to be a man of ordinary mind. I did not notice anything peculiar." "I supposed he was capable of transacting ordinary business at the time of the transactions I had with him. I did not look upon him as a weak, imbecile man, incapable of transacting ordinary business—such business as he was in the habit of transacting. I presumed he was capable. He appeared to understand the price he ought to get for his property. He seemed to have the usual mind of a man in his sphere of life and business. I can't say I saw anything leading me to suppose his mind was impaired."

Mrs. Reed, the wife of one of the previous witnesses, who was in the habit of seeing and conversing with Mr. Silber frequently previous to his wife's death, says he used

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MOWEY vs. SILBER.

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to talk about his younger days, and "used to tell the same story over and over again—always the same. He used to do this very often." "I considered him an intelligent man before Mrs. Silber's death; but the year after her death I did not think he was. I thought he was a weak-minded man. I think he failed a great deal—became weaker in body and mind." "I did not think he was a weak-minded man till the year after his wife's death, and then I did. He appeared to be easily persuaded."

Mr. McIntyre states that when he lived in the neighborhood, he had business dealings with Mr. Silber. He esteemed him to be of sound mind, good judgment, and capable of making a good bargain. But he left that vicinity about six years ago, since which period he met him only casually in the street, and exchanged a few words with him. He says: "I had, after I left the neighborhood, no such communications with him as to enable me to judge of the soundness of his mind, except that when I did see him I observed nothing indicating unsoundness but the effects of old age, and that he was getting feeble." "I don't think I saw him after his wife's decease."

John Hilton, who knew the decedent for twenty years, and traded with him when he was in business, states: "I considered him capable of transacting business six years ago." "I considered him a bright man, taking in view the disadvantages he labored under, from speaking English imperfectly." "He was in the habit of coming to my store, sitting and talking, may be, quarter or half an hour." "The last time I saw him, to talk with him, was about three months before his wife's death. At that time I observed no failure in his health. I observed no change in the capacity of his mind at that time. He did not seem so bright as before. He was rather dull, and could not comprehend so quick as formerly. He did comprehend, but not so readily. I rather think he was then affected by his age; but not to such an extent as to make him incapable. He knew very well what he was about."

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MOWRY vs. SILBER.

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Mr. Johnson, a grocer, who knew the decedent about three years, and spoke with him not over three times a year, says: "I last conversed with him about a month or two before his wife's death. When he came to pay his bills, he seemed to understand what he was about." "I always thought he was capable of transacting business; but had very little chance to judge."

This ends the list of the witnesses brought to sustain the capacity of the decedent. It consists of the two gentlemen who witnessed the will—one of whom never was in his company before, and the other had seen him only once previously; of the physician, to whom he was a stranger; Mr. Reed and his wife, neighbors, who saw him frequently; and Denham, McIntyre, Hilton, and Johnson. Mr. Whitehead formed his opinion mainly from the manner in which the decedent gave the instructions for drawing the will. Mr. Price was not in the room even when the will was read, and had no other opportunity of judging, than was afforded by the few words that passed when the will was executed; and Dr. Pennington had no conversation with him beyond the usual inquiries in respect to his symptoms. Mr. Reed's opinion is entirely overborne by that of his wife, and by the facts on which she based her conclusions; and her means of observation were far superior to his. Mr. Denham saw the decedent but once after the decease of his wife. Mr. Johnson, to use his own words, "had little chance to judge" of his capacity, and conversed last with the deceased a month or two before his wife's death. Mr. McIntyre did not see him after his wife's death, and for the last six years had only exchanged a few words with him in the street. Mr. Hilton was in the habit of social intercourse with him to a later period; but had no conversation with him since about three months before his wife's decease, and then he thought him affected by age, and more dull than formerly, though not to such a degree as to render him incapable.

The evidence on the part of the contestants comes down

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MOWRY vs. SILBER.

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to a more recent date, and is derived from parties who possessed better opportunities of forming a correct judgment.

Charles Feitner, a brother-in-law of the deceased, and a witness for the executor, says: "I observed a very great alteration in him after the death of his wife. He gave up to grief." "He seemed to sink in health after his wife's death. He became very feeble. Before his wife's death, so far as I knew, his mind was sound. His habits were very singular—were German. He became very melancholy after his wife's death. I did not see him very often. There was no insanity; but after his wife's death, I should not think him capable of conducting business." "His mind became so melancholy and unconcerned that I think he was incapable of doing business."

John Doyle, who married the decedent's neice, and knew him for twenty years, says: "In point of intellect, I should consider him a very plain man indeed—I should think below the medium rate of capacity, in his brightest days, I mean. I saw him after his wife's death. I discovered a very material change in him. He appeared to be perfectly like a child; had no animation whatever in his manner of speaking. When you would speak to him, he would just answer the question, and seemed hardly to know what was said and what he was saying. His chief conversation was, that he wished to go where his wife was." "He appeared to fail both in body and mind; and I think in mind most, from his appearance. He appeared to me to be perfectly stupified—to have lost all animation. When I saw him, he was lying down. He seemed to be perfectly stupid. I should not think he was able to concentrate his mind on any given subject so as to do business." "I last saw him some weeks before he went to Newark. That is the only time I saw him after his wife's death. I should not think he was of sound and disposing mind, and capable of making a will at that time."

Dr. Nelson, who was acquainted with the decedent for the last ten years of his life, and for a part of that period

## MOWAT vs. SILBER.

was his family physician, says that in his brightest days "he was a man of limited capacity." "He was certainly not the man, mentally, the last two or three years, that he was when I first knew him." "I never thought he was idiotic. I doubt if he was capable of taking care of his interests in the last few years. I can only judge from my general views of his character. He was what I should call childish." "I don't think he was an idiot, or insane, but he was partially imbecile or childish."

Dr. Wells, who knew the decedent over twenty years, says that "for the last ten or twelve years there was a falling off in his capacity, which, for the last four or five years, became more marked. His bodily and mental vigor were very much impaired by the ravages of time, and the circumstances attending his trials, cares and pains." The Doctor attended him on one occasion, after his wife's death, in April last, and states that he then "seemed almost lethargic." "He evidently was affected by the death of his wife; for from that time he was worse in body and mind." "The last three or four or five years"—"I should not think he was capable of transacting business. I should think he was childish. He was growing uniformly more infirm as to his mind in the last four or five years."

Catharine Harsen, a sister-in-law of the deceased, who knew him thirty-seven years, says: "Before the death of his wife, I discovered a change in his mind. His mind grew duller. I thought his intellect was a great deal weaker." "He was very much affected by the death of his wife, so that he cared for nothing." "His mind was affected by her death. He said he would as lief die as live."

Mr. Denman, who knew the decedent for fifteen years, says: "There was no particular difference in his intellect, that I ever discovered, until the decease of his wife. He then seemed to be failing; and in his conversations subsequent thereto, expressed, as his only wish, a desire to depart and be with her. His mind was then weak and feeble—

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MOWRY vs. SILBER.

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confined to one idea. I should think he was not then capable of disposing of his property with any intelligence." "He did not recover from grief, as other men do. He shewed no aptitude for anything else, except to die. His whole sense was swallow ed up in that sentiment."

The Rev. Mr. Crawford, the minister of the church to which the decedent was attached, and who visited and conversed with him frequently after his wife's death, says : "When I first became acquainted with him, he appeared to me to be in a broken state—not by any means to be enjoying his full strength of mind. He complained to me of failing memory, and of great timidity. This was before his wife's death. I noticed immediately on the death of his wife, I thought, a very decided sinking in mental power and physical health both—a general giving way of the forces of life. I think his weakness, mental and bodily, rather increased. He seemed less and less collected in his conversations." "This sinking appeared to me to continue till I last saw him. It appeared to me he was not of sufficient mental capacity to make a will at any time after his wife's death." "I should have called him a childish old man. The childishness increased very manifestly after his wife's death." "The death of his wife weighed upon him very heavily. His mind could scarcely be diverted from it. That seemed to be the one idea." "His mind was very inactive. Sometimes, when I was speaking to him, he appeared to settle away, and not to notice anything around." "His incoherence was more discoverable on other subjects than on his wife's death. It was evinced in stating the same thing over and over again, on different visits and sometimes on the same visit, as if it were quite fresh." "When I last saw him, there was considerable change, as to the state of his mind, from what it was when I first saw him. It seemed to be an aggravation of the same difficulties under which he labored when I first saw him—the loss of memory and confusion of mind—added to which there

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MOWRY vs. SILBER.

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was a settled melancholy for the loss of his wife, from which I never saw him aroused."

Without going further into details of this kind, it is enough to say that the same general view of the decedent's mental condition was taken by several other witnesses, whose means of observation were quite equal, if not superior, to those of the witnesses on the part of the executor. The evidence very clearly preponderates towards the conclusion that for several years the mind of the decedent was failing in vigor and tone. He retired from business, depended more on his family, and when his wife died, surrendered himself to melancholy and despondency. His memory became impaired; he repeated the same thing several times in the course of the same conversation; he cried when his wife was alluded to; and, to use the language of one of the witnesses, had a "monomania" on that subject. These facts are established by persons with whom he dealt, and by his brother-in-law, nephew, and sister-in-law, two physicians who had attended him, and the clergyman of the church to which he was attached. Though a state of absolute legal incompetency is not shown, yet the mind of this old man was so impaired that a testamentary disposition of his property should not be sustained, unless affirmatively proved to have been fairly made, to have emanated from him of his own free will, without the interposition of others, and to have accorded with his testamentary intentions, otherwise expressed or to be implied from the existing state of his family relations.

Several of the witnesses, who enjoyed excellent advantages of observation, state that the decedent never indicated any preference or partiality among his children, unless it were for Mrs. Rogers, William and Theresa; and there is not a breath of evidence tending to show peculiar favor towards Mrs. Mowry. Some years before his decease he gave each of his children, except Theresa, a lot on 36th street. The one designed for Theresa was sold, and he intended to give her another in lieu. Subsequent to that

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MOWRY vs. SILBER.

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time his wife suggested to him the propriety of making a will, for the purpose of securing the lot to his daughter Theresa, who was a minor, he "being satisfied with the disposition the law would make of the rest of his property." After his wife's death, in the winter of 1850-'51, the deeds were placed in the hands of Mr. Reynolds, upon the understanding a purchaser was to be found, and the lot sold on a long credit, and a mortgage taken to Theresa; and thus the supposed necessity for making a will would be obviated. (2 *R. S.*, 3d ed., p. 38, §§ 23-26.) "Subsequently," says Mr. Reynolds, "Mr. Frederick Silber called on me for the deeds, saying they thought they had found a purchaser, and wished to show him the deeds. I heard no more of it till I heard of Mr. Silber's death." Mrs. Reed states: "I recollect once, after his wife's death, he told me Theresa had been crying about her mother's death, and he told her not to grieve—he would leave her enough to take care of her." Mrs. Harsen, his wife's sister, says, "His wife often wanted him to make a will. He said there was no occasion for it. His oldest son, Frederick, would see all things right after their death." About two weeks before he went to Newark, this witness conversed with him. She says, "He showed no partiality among his children. He said he thought as much of one as another."

Under such circumstances, it would be reasonable to expect that a will, if made, would provide equally for all his children, after devising to Theresa the lot designed for her. The instrument offered for proof devises that lot to Theresa, but also gives his dwelling house on 18th street to Mrs. Mowry, subject to legacies of \$650 to each of his other five children. These legacies were payable, without interest, at the end of a year. The house is worth some \$6,000. Thus, with the exception of Theresa's lot, almost the entire half of the estate is given to Mrs. Mowry, and the remainder among the other children. This is unequal, and finds nothing to support it in any glimpse we can obtain of his intentions in respect to his property, or of the state of his

## MOWRY vs. SILBER.

affections towards his children. He had a right to make such a will; but satisfactory evidence should be adduced that he did make it—that in his weak condition of mind he was not unduly biased or influenced to the performance of an act discordant with his previous intentions.

Much stress is deservedly laid in cases of this kind upon the instructions. But it is not enough that the instructions should proceed formally from the testator to the draftsman. Nothing is easier than to supply such important evidence, by preparing the mind and moulding the will beforehand, so that no trace of the controlling influence need be discovered, except so far as must appear in the nature of the instructions. Mr. Whitehead, the counsel who drew the will, says, "He simply gave me his directions—gave me no reasons for the bequests he directed. He appeared to have made up his mind previously as to the provisions of the will. That was undoubtedly the case." "I made no suggestion, but took his instructions and acted upon them. I think I simply received his instructions, and did not go into particulars." Mr. Whitehead states that he was "particularly struck" with the clear and intelligible manner in which Mr. Silber expressed himself as to the provisions of the will; and he says the "decedent spoke English well, fluently, so that he could be well understood, but with a slight German accent." It is certainly remarkable that such instructions should have been so clearly given, and that the decedent should have spoken so fluently as to be readily understood, when the evidence in the case conclusively establishes that Mr. Silber understood English so imperfectly, and spoke it in such a broken manner that it was difficult to understand him, and necessary, in order to hold a protracted conversation, to repeat and explain frequently. I have no doubt of the correctness of Mr. Whitehead's testimony; but it is susceptible of reconciliation with other evidence, on the supposition that the decedent had *previously* made up his mind, which, indeed, Mr. Whitehead says "was undoubtedly the case." Very little, if any, weight

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MOWRY VS. SILBER.

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is to be given to instructions under such circumstances, except so far as they go to show that if the testator had been previously tutored, he had mind enough, for the moment, not to forget his lesson. Mr. Mowry was present when the instructions were given, and the only remark he seems to have made was an expression of dissent when he was named as executor, to which the decedent replied, "very emphatically, I wish you to be the executor." That he knew something relative to the proposed contents of the will is evident from his statement to Mr. Whitehead, that his father-in-law wished him to be executor, and he did not wish to be. Mr. Mowry engaged the lawyer to draw the will, arranged about the fee for drawing it, suggested who should be the subscribing witnesses, fixed the time for its execution, and was the single person present when the instructions were given and when the will was read, the other subscribing witness, Mr. Price, not being permitted to attend that part of the ceremony, but being placed in the parlor until it was over. What became of the will afterwards does not appear; but there is no evidence that the fact of its execution was known to any member of the family until after Mr. Silber's decease. If the will was made by Mr. Mowry's procurement, this is not singular; but that the decedent should not have divulged it, is more remarkable. Mrs. Harsen, his wife's sister, visited him at Newark on the 11th and 31st of August. On the first occasion, she sat in his room nearly an hour. She asked him if his affairs were settled in case of death; and he, answering in the affirmative, said, "My oldest son will see to it—Frederick;" and subsequently, on her speaking in relation to Mrs. Rogers, he said, "It would be made equal and right with all." There is another feature of the transaction of no slight importance. Mrs. Mowry appears to have been in delicate health, and unable to attend her father; and there was no other person in the house belonging to the family, except Theresa—and yet Theresa was not seen, either on the occasion of giving the instructions or of

## MOWRY vs. SILBER.

executing the will. Mrs. Rogers was then in New York. Dr. Pennington was called in on the 9th of June, and visited him again on the 10th and 24th. Mr. Whitehead fixes the date of his instructions from two to four days before the 14th, the day the will was signed. That this sickness suggested the occasion for drawing the will is quite possible; but, from the 10th to the 24th the physician did not visit him, and there was no apparent reason for hurrying the execution. Mrs. Rogers returned on the 14th, and became his regular nurse and attendant; but the will was executed before her return, in the afternoon of that very day. These circumstances may be susceptible of explanation, and I am not inclined to draw harsh inferences from them; but, unexplained, they present the appearance of clandestinity. We find this weak-minded old man, broken down by age and disease, and depressed with grief, alone with his son-in-law; and then this will is begotten, having but a single feature in harmony with all that we know of his previous intentions and dispositions, and that feature one which it would have been palpably fatal to have left out of the instrument. I do not mean to say that the circumstances prove fraud; but so far from establishing the fairness of the transaction, they have a different tendency. Nothing but the most clear and satisfactory proof of freedom from control, and of self-volition, could sustain *such* a will of *such* a testator. An old man of decayed mind, the father of children equally the just objects of his bounty, should not have been permitted to perform such an act without every care taken to show that it was his own desire, and not another's device. His children should have known it; there should have been no secrecy. And yet the sole person near him is his son-in-law—the person most deeply interested in the execution of the instrument; and, in consideration of the mental infirmities of the decedent, his difficulty of expressing himself intelligibly, and of comprehending others readily—facts abundantly proved—the ordinary presumptions flowing from the act of formal exe-

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MOWRY vs. SILBER.

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cution do not obtain, but the burden is thrown upon the party seeking to establish the testamentary act, to show that all those precautions were taken, and those explanations were had, that were necessary to secure to the party the full, free and unbiased action of his impaired faculties. In such a case, the order of proof is inverted. "It is almost superfluous to observe," says a distinguished commentator, "that in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty and should be anxiously the care of all persons assisting in the testamentary transaction to be prepared with the clearest proof that no imposition has been practised." (*Jarman*, 1, 30.) The instrument now offered for proof is, in its most prominent characteristics, at variance with the intentions of the deceased, as proved by the state of his affections, his previous declarations and acts. All of the family were absent from the execution; strangers were the witnesses; besides them, the sole person present was the husband of the chief beneficiary; none but Mr. Mowry's hand is seen in the affair from its inception to its close. There is no indication that the will was known to the family to exist until after the decease; and, whether contrived or not, the whole transaction was in fact accompanied with complete privacy. In view of the mental and physical weakness of the decedent, I cannot, in the face of such facts as these, sustain this will; and it must, therefore, be denied probate, on the ground that the proof is deficient in not affording such satisfactory and decisive evidence as the circumstances demand.

WOODRUFF vs. COX.

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## WOODRUFF vs. COX.

*In the matter of the estate of ABRAHAM H. VAN WYCK, deceased.*

Is, after letters testamentary granted to a feme sole executrix, she shall marry, her husband is liable for her acts before and after marriage, and they may be sued jointly. It is not necessary, in order to make the husband liable, that he should file a consent with the Surrogate; that is requisite only when the executrix is a feme covert at the time she receives letters. Marriage after letters granted is as effectual a consent as a written consent, under the statute after marriage, before letters granted; and in either case, the husband and wife are jointly responsible, and liable to account in the Surrogate's Court.

The power of the husband of a married woman executrix is substantially that of an executor. His wife cannot act without his concurrence, and he has the power of disposition over the estate.

In all proceedings relative to the estate, either the party moving or the executrix may set up the joint liability of the executrix and her husband; and the husband will then be cited jointly with his wife, to abide the orders of the Court in the due administration of the estate.

J. C. ALBERTSON, *for Petitioner.*

W. SILLIMAN, *for the Executrix.*

**THE SUREGATE.** The executrix having, on the application of an alleged creditor, been required to show cause why his claim should not be paid, appeared and averred that since the issuing of the letters testamentary she had married; and her husband not having been made a party to the proceeding, she insisted the application should be dismissed, with costs.

The statute prescribes that no married woman shall be entitled to letters testamentary, unless her husband consent thereto, by a writing to be filed with the Surrogate; and that, by giving such consent, he shall be deemed respon-

## WOODRUFF vs. COX.

sible for her acts jointly with her. (2 *R. S.*, 3d ed., p. 134, § 5.) The object of this provision was to determine a point much discussed, "the law on the question of a married woman being entitled to letters, without the consent of her husband," being "very unsettled." (3 *R. S.*, 2d ed., p. 635; *Revisers's Notes*; *Wentworth*, 377.) This section, therefore, declares that letters shall not issue to a married woman without the consent of her husband.

There is another class of cases beyond the provisions of this section: that is, where a woman marries after being appointed an executrix. In that case the Surrogate, on the application of any person interested, may revoke the appointment. (*Laws* 1837, *Ch.* 460, § 34.)

There never was any doubt that when letters have been granted to a feme sole, and she afterwards marries, her husband is liable for her acts before and after marriage, and they may be sued jointly at law or in equity for a devastavit committed by either. (*Bunce vs. Vander Grift*, 8 *Paige*, 39.) It is not necessary, to make the husband liable, that he should file a consent with the Surrogate. That provision of the statute is applicable only when the executrix is a feme covert at the time she receives letters. By the voluntary act of marriage, the husband effectually consents to become liable for his wife's acts, and assumes the responsibilities growing out of her position as executrix, when she already occupied that position at the time of marriage. Marriage in such a case expresses a consent quite as valid as a written consent filed under the provision of the statute referred to.

When, then, by a consent pursuant to the statute, or by having married a person already appointed executrix, the husband becomes liable for the acts of his wife jointly with her, is he liable to account in the Surrogate's Court?

At common law and in equity, in an action against a married woman executrix, or in an action by her, the husband must be joined. (*Com. Dig.*, *Adm.* [*D*], *Mitf. Pl.* 30; 2 *Atk.*, 213.) But by the canon law there was no

distinction in this respect between women married and unmarried; and therefore in the ecclesiastical courts the wife may sue and be sued alone. (*Went. Off. Ex.*, 375.) Still in the spiritual courts the husband of a feme covert, executrix, was amenable to authority; and in one old case it was held that if a woman, executrix, marries, and her husband wastes the goods, and she dies, though there was no remedy against him at law, there was in the ecclesiastical court, where he could be compelled to make proper execution; and prohibition prayed for against the Court was denied. (1 *Rolle's Abridgment*, 919.)

The power of the husband of a feme covert, executrix, is substantially that of an executor. She cannot act without his concurrence, (*Went.*, 380; 5 *Co.*, 27, 6; 1 *Sid.*, 31, 188; 6 *Mod.*, 93); and he has the power of disposition over the estate. (2 *W. Bl.*, 801; 1 *Roper, Husb. and Wife*, 188.) The wife, says Powell in his notes to Swinburne, cannot be executrix without her husband's assent; for if she might, "then he would be *executor* against his will." (*Swinburne*, 417, 418; 4 *Burn, Ecc. L.*, p. 155; *Toller*, 241.) Toller says, if he assent, "he shall have the *execution* of the will;" and Wentworth,—“If a married woman be an executrix, or administratrix, the husband has a joint interest with her in the effects of the deceased, *such as devolves the whole administration upon him*, and enables him to act in it to all purposes, with or without her assent.” (*Went.*, 199, 375; *Williams on Ex.*, 190, 788, 825.) If the testator owed the husband, he could, at common law, retain for his debt; and on the other hand, if he owed the testator, the debt was released. In all these respects, during the life of the wife the husband was substantially the executor, by operation of law, though not so named in the will.

The effect of marriage after letters granted is the same as the grant of letters after marriage with the consent of the husband—that is, it makes the husband jointly responsible with his wife. He is, in most respects, a joint or co-executor. At law he has all the substantial rights of an

## WOODRUFF VS. COX.

executor, and he is liable as an executor ; and I cannot think, when liable in all other tribunals, there is any sound reason why he should be exempt from responsibility as executor in the Surrogate's Court, where such matters are peculiarly cognizable. It would be most singular, if possessing the powers of an executor, he could here be held to none of its duties. Suppose he commit a devastavit, against the will of the executrix, could she be punished by process of attachment ? Suppose he obtain possession of the assets, can she be ordered or compelled to distribute when she has not the power ? Or suppose, on accounting, a decree for payment be made against her solely, what effectual remedy is there for its enforcement by execution ? When the statute decrees that the effect of the consent filed with the Surrogate shall be to make the husband jointly responsible, no exception is made—no particular tribunals are named—but the language is general and absolute—"He shall be deemed responsible for her acts *jointly* with her." As his liability is *joint*, of necessity wherever, by virtue of her office, any court has jurisdiction over her, the same authority obtains over him. This must be conceded in cases where a consent is filed under the statute ; and, as the effect of marriage after letters issued is equivalent to a consent, the same rule must be applied in the latter instance. Either the creditor or the wife may insist upon its application, for the protection of their rights and interests ; and the executrix having claimed the benefit of it in the present instance, the creditor must proceed against her and her husband jointly.

## RICHARDSON vs. JUDAH.

*In the matter of the Estate of SAMUEL N. JUDAH, deceased.*

THE intestate was the owner of an undivided fourth-part of certain lots of land; and after his decease, one of the tenants in common instituted a suit in the New York Common Pleas for partition. The proceedings were regularly conducted to a decree, the premises sold, deeds given, and the proceeds of sale distributed among the parties. The personal estate having been insufficient to discharge the intestate's debts, a creditor applied for the sale of the real estate of which he died seized, for the payment of his debts, and the administrators were ordered to shew cause why the application should not be granted. The administrators set up the sale in partition and distribution of the proceeds; and it was *Held*, that the administrators, not representing either the heirs or the purchaser, it was not competent for them to raise the objection.

If, on the return of the order requiring the administrators to shew cause, it appears that all the personal estate has been applied to the payment of debts, and that there remain claims unpaid, for the satisfaction of which a sale of the real estate may be made, the Surrogate is bound to issue the second order requiring all persons interested in the estate to shew cause against the application. On the return of this last order, the heirs, or parties claiming under them, may intervene and oppose the proceedings.

If, on the return of the order requiring the administrators to shew cause, they allege that other persons besides the heirs are interested, it is proper to direct the service of the second order on such parties, though the statute does not demand such service.

S. B. H. JUDAH, for the Administrators.

L. The Surrogate, by 2 *R. S.*, p. 100, § 8, is to decide whether there is real estate subject to his order; and the administrators are bound to set out the facts, that a decision may be had.

## RICHARDSON vs. JUDAH.

1st. Whether *there is real estate* that can be affected by the Surrogate's decree.

This question involves the whole merits, and should now be decided.

2d. The Surrogate cannot make an order affecting the property already sold under the decree in the partition and foreclosure suits.

The sales in these suits changed the seisin of the intestate in the lands into assets, and converted the real estate into personal. (*Ellsworth vs. Cook*, 8 *Paige*, 643.) On an application like the present, a perpetual injunction was granted against the administrator. (*Brevoort vs. McJimsey*, 1 *Edw. Ch.*, 551.)

3d. The intestate held an undivided interest in common in the property with others; his death could not prevent his co-tenants from partition. (2 *R. S.*, 321, § 23, *p.* 329, § 70; *Smith vs. Smith*, 10 *Paige*, 470, 473, &c.; *Vanarsdale vs. Drake*, 2 *Barb. S. C. R.*, 599.) If the property did not admit of partition, the party applying for partition had a right to have it sold, (2 *R. S.*, 330, § 81; 6 *Johns., C. R.*, 436; 2 *Barb. S. C. R.*, 599); and decree of sale being made by a court of competent jurisdiction, with the proper parties before it, the purchaser takes title free from all after acquired rights of the representatives of the deceased co-tenant. (*Harwood vs. Kirby*, 1 *Paige*, 469, 472; 2 *R. S.*, 325, § 51, 327, § 66.)

II. The administrators were parties to the suit in partition, and their rights were adjudicated. (3 *Barb. C. R.*, 343; 3 *Johns., C. R.*, 295.)

1st. A notice of *lis pendens* was filed in the partition suit; and if it had not been, the administrators were representatives of the creditors, and the decree was final against them. (2 *Paige*, 387.)

2d. By the decree in partition, all inchoate or contingent rights were determined. (2 *R. S.*, 318, § 5, *Sub.* 2, § 7; *Ibid.*, 322, § 36; *Jackson vs. Edwards*, 7 *Paige*, 387.)

3d. It is too late now to object that any inchoate, con-

tingent, or future interest was not protected by the decree. If at all, such error must be corrected on appeal from that decree. (*Dunham vs. Minard*, 4 Paige, 441.) The cases of partition and foreclosure are alike. The words of the statute on partition are the most explicit. (2 R. S., 192, § 158.) The Surrogate could only have had concurrent jurisdiction with the Court of Equity had these proceedings been commenced earlier, and the decree and sales being perfected, the whole matter is *res adjudicata*.

4th. The statute, where it allows the Surrogate to order the sale of "so much of the real estate whereof the testator died seized" (2 R. S., 103, § 18), does not mean that the right to make such order affixes itself to the land from the time of the intestate's or testate's death, notwithstanding the operation of any other statute on the seisin; but such provision of the statute is to be fairly construed, so as to harmonize with other cognate statutes. (2 R. S., 3d ed., 875; *App.*, 2d ed., 778, § 12; *Dwarris on Stat.*, 756, &c., 729, 690; 4 T. R., 2; *Plow.*, 205; 11 *Mod.*, 161; 1 *Show*, 491; 1 *Jon.*, 105.) The statutes relating to foreclosure and partition form a part of the Revised Statutes as well as that relating to executors and administrators, and must be construed as one law.

5th. The statute contemplates that the real estate remained, at the time of the application for sale, as it did at the time of the intestate's death (2 R. S., 100, § 1); and the only persons to whom notice is to be given are the widow, heir, or devisee, and the actual occupants of the land. (§ 2, &c., 6, 7.)

The publication for *all interested* to show cause, extends only to those who claim immediately under such widow, heir, devisee, or occupant.

The Surrogate has no jurisdiction of the purchaser at the partition sale. The powers of the Surrogate are limited by statute. (3 *Barb. S. C. R.*, 341.) The land, by the partition sale, is no longer the estate of the intestate, and the purchasers are "*not parties interested in the intestate's estate.*" (§§ 9, 10 and 17.)

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RICHARDSON vs. JUDAH.

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6th. The sale under the partition decree is not a sale made or procured by the heir within the case of *Mathews vs. Mathews*, 1 *Edw., Ch. R.*, 565.

The decree in partition was obtained *in invitum* as against the heir and the administrators, and their several rights have been divested by a competent court, and in pursuance of an existing statute law. (4 *Wend.*, 443.)

7th. If the Surrogate can order a sale, notwithstanding the former sale under the decree in partition, the result will be that the intestate's share is doubled. It has been paid for in full by the partition sale, and it will have the further proceeds of the sale to be decreed by the Surrogate. This fact at once shews the absurdity of the present application.

Lastly: A further proceeding on this application will be idle, as no title can be given under any order of the Surrogate.

The heir is personally liable, if he has received the proceeds of the partition sale.

W. K. THORN, for Creditors.

THE SURROGATE. The petitioners apply, as creditors of the intestate, for the sale of his real estate for the payment of his debts. Letters of administration were issued, March 15, 1849, and the accounts of the administrators were duly settled before the Surrogate, March 12, 1851. There not being sufficient personal assets to pay the debts, the present proceeding was instituted, January 7, 1852. The real estate described in the petition as the property of which the intestate died seized, is the undivided fourth-part of several lots of land in the city of New York. On the return of the order to show cause, the administrators set up in bar of the application, that after the death of the intestate, one of the tenants in common of the premises in question instituted a suit in partition in the New York Common

Pleas, to which the administrators, the widow, and the heir at law of the intestate were made parties; that the proceedings were regularly conducted to a decree, the premises sold at public auction, deeds given to the purchasers, and the proceeds of sale distributed between the heir at law and the widow, under the direction of the Court. This state of facts presents the question, whether a sale in partition, under the decree of a Court of competent jurisdiction, of premises in which the intestate had an undivided interest, has the effect of cutting off the right of creditors to have the real estate of the deceased sold for the satisfaction of his debts. There is no controversy that the deceased died seized of certain real estate, and that it must be sold for the payment of his debts, unless a superior title has been acquired by other parties. If there are other parties besides the heir, interested in the estate of which the deceased died seized, they should have, and will have, an opportunity of being heard. If there are no such parties, then there is no pretence of an answer to this application. But I do not think it competent for the administrators to raise that point. They have nothing to do with the real estate. They are merely the formal medium through which the rights of creditors may be enforced against the real estate; but they have no interest in the premises, do not represent the heir or the purchasers, and cannot interpose any defence in their behalf. They may refuse to set on foot proceedings to sell the lands of the deceased for the payment of his debts, and if measures to that end are taken by creditors, they may, on the return of the order to show cause, decline acting, in which case the Surrogate is authorised to appoint a disinterested freeholder to act in their stead. If, on the return of the order to show cause, it appears "that all the personal estate of the deceased, applicable to the payment of his debts, has been applied to that purpose, and that there remain debts unpaid, for the satisfaction of which a sale may be made," the Surrogate is bound to issue the second order, requiring "all persons interested in the estate"

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RICHARDSON vs. JUDAH.

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to shew cause why the real estate should not be mortgaged, leased or sold. On the ascertainment of the insufficiency of the personal estate, the Surrogate "shall" issue the second order; and, till the return of that order, there is no discretion vested in him (§§ 8, 54.) I think, therefore, it will be time enough to consider the question raised by the administrators, as to the effect of the sale in partition, when the parties in interest come before me and insist upon their title. It would be improper for me to express an opinion at this stage of the proceedings, when the real parties in interest have not yet had an opportunity of being heard. By the terms of the statute it will be competent hereafter for the "heirs," or "any person claiming under them," and "all persons interested in the estate, who shall think proper to oppose," to interpose a defence, and insist upon any proper legal bar to the application. It is not the business or right of the administrators to anticipate such objections—to assume a defence, and claim its decision at this preliminary step. They have discharged their duty in placing before the Court the facts which show there are other parties in interest besides the heir and the widow, and though the statute does not require notice of the next order to shew cause, to be served personally on persons claiming an interest in the premises under the heir, yet, whenever it appears that lands have been sold, either by the heir, or under the decree of a court, such service is very proper, and should be required by the Surrogate.

An order must therefore issue, directing all persons interested in the estate to appear and shew cause why authority should not be given to the administrators to mortgage, lease, or sell so much of the real estate of the intestate as shall be necessary to pay his debts, and a copy of the order must be served on the parties who became purchasers at the sale in partition, so as to afford them an opportunity of contesting the application.

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EX PARTE, BEERS.

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## EX PARTE, BEERS.

*In the matter of proving the last will and testament of EDWARD A. BEERS, deceased.*

THE decedent acknowledged the subscription of his name to the instrument offered for probate,—the document was so covered by a piece of blank paper that no part was visible but the attestation clause, the signature, and a line or two of the will,—the witnesses might have read the attestation clause, but they did not, and were not requested to do so,—both witnesses concurred in stating that the decedent only acknowledged his signature, and, pointing to the attestation clause, requested them to sign as witnesses, but did not declare the instrument to be his will,—from extraneous circumstances they supposed it to be a will, and one of them expressed that opinion to the decedent, who neither assented to nor denied it,—Held that there was not a sufficient testamentary declaration, and that the will must be rejected as invalidly executed.

A declaration is an open act or manifest signification, or assertion or assent by words or signs; and it must be made to appear by unequivocal circumstances, so that the testamentary character of the instrument is shown to have been communicated by the testator to the witnesses.

G. W. STRONG, for Executor.

THE SURROGATE. The decedent acknowledged the subscription of his name, at the end of the will, to the two subscribing witnesses. The document, at the time, lay open on a desk, covered with a piece of blank paper, so that no part was visible but the attestation clause, the signature, and the last line or two of the will. The witnesses might have read the attestation, but they did not, and were not requested to do so. One of them states that he read the greater part if not all of the first line of the attestation; but that line does not state the nature of the instrument. Neither of them, in fact, read any portion of the paper showing that it was a will. Ordinarily, where the witnesses do not recollect the circumstances attending the execution, resort

may be had to the attestation, as the basis of a presumption of due execution. But there is no room for such an inference when the witnesses recollect all the facts, and expressly deny the performance of the solemnities required by the statute. In the present instance they both concur in the statement that the decedent simply acknowledged his signature, and, pointing with his pen to the attestation clause, requested them to sign as witnesses, and state their residence under their signatures. They affirmatively disprove any testamentary declaration, and show that that essential ingredient was entirely wanting. From extraneous circumstances they guessed it was a will, and one of them expressed his opinion in this way: "It is a poor look for me, as a witness to the will does not receive anything." The decedent laughed, but still neither assented nor dissented; and that was the whole transaction. Unless the remark just adverted to, and the laugh in reply, can be construed into a declaration by the decedent that the paper was his last will and testament, there is no possibility of sustaining the execution. But that circumstance is susceptible of more than one interpretation, and neither the witnesses nor the Court could safely and surely conclude from it the intention of the party to publish it as his will. So material a part of an important affair cannot be left to the interpretation of a laugh, to mere guess, surmise or conjecture. A declaration is an open act, a manifest signification or assertion, or assent by words or signs; and it must be made to appear by unequivocal circumstances, so that the testamentary character of the instrument is shown to have been communicated by the testator to the witnesses. There must be some clear indication of the *animus testandi*,—what the Touchstone terms a "firm resolution, and advised determination to make a testament." Casting from our minds all that we now know of the character of this paper, by inspection, and regarding only the depositions of the witnesses, can we, from what transpired, at the time, discover a declaration by the decedent to the witnesses that it

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MARRE vs. GINOCHIO.

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was a will? That he knew it was a will is reasonable to suppose, that they guessed it was a will appears; but their minds did not meet on that as a common ground; and though the conjecture was clothed in the form of words by one, it was neither denied nor admitted by the chief actor. A will cannot be made by silence; there must be a distinct, affirmative performance of all the statutory requisites. When the witnesses positively swear that no part of the paper indicating that it was a will, was read by them, that the decedent carefully concealed from them the body of the instrument, that he did not ask them to read the attestation, and did not intimate that it was his will; it must require something more than a laugh responsive to a suggestion showing one of the witnesses supposed it to be a will, in order to establish the declaration essential to due execution. Such a requisite may be inferred, but the inference must be reasonable, and the fact from which it is drawn unequivocal, and certain of interpretation. I am constrained for these reasons to pronounce against the probate.

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MARRE vs. GINOCHIO.

*In the matter of the Estate of PAUL LONGINOTTO, deceased.*

Uron an accounting, the affirmative of establishing more assets than are acknowledged by the inventory and account, is with the party objecting; and it must be established with reasonable certainty, and not left to mere conjecture or suspicion.

A creditor of the estate is not a competent witness to swell the fund out of which he is to be paid, when the estate is insufficient to pay the debts.

The husband of a *feme covert* executrix is jointly liable with his wife in the Surrogate's Court; and where the husband was the surviving partner of the testator, it was held that a statement of the partnership affairs was incidentally necessary to the settlement of the accounts of the estate,

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MAREE vs. GINOCCHIO.

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and that the husband of the executrix must render such copartnership account.

GERARDUS CLARK and JOHN NEWHOUSE, *for Creditors.*  
C. A. RAPALLO and HORACE F. CLARK, *for Executrix.*

THE SURROGATE. Letters testamentary were issued to Mary R. Ginochio, a married woman, on the 18th of March, 1850. On the 1st of December, 1851, she presented an application for a final settlement of her accounts, and on the return of the citation a number of creditors appeared, objections were made to the account, and a large amount of testimony was taken.

The testator and Lewis Ginochio were partners in business in this city. They kept an Italian boarding house, to which a store was attached. The store seems to have been managed by Ginochio, and since the testator's death he has wound up the business as surviving partner.

The testator was in the habit from time to time of receiving deposits of money from Italians, and at his decease had considerable sums on deposit in the savings bank and the Life and Trust Company. These sums, however, fall much short of what had been placed in his hands by depositors; and it is urged that the most reasonable manner of accounting for the deficiency, is on the supposition that these funds were contained in a trunk kept by the deceased in his room, which immediately after his death was taken in possession by Lewis Ginochio, the husband of the executrix. There is evidence to show that at different times money was seen in this trunk, but there is nothing to indicate the amount, or to prove that there was in fact anything there at the testator's decease. Longinotto died March 2, 1850; and he made a deposit in the Trust Company of one hundred and twenty-five dollars, so late as February 1, 1850. So far as I have been able to discover, he does not appear to have received anything on deposit after that period except thirty-nine dollars; and the executrix returns,

## MAREE vs. GINOCCHIO.

as cash on hand, at the time of his death, forty dollars. The act of Ginocchio, in removing the trunk from the testator's room, on his decease, was proper enough ; but, for the satisfaction of parties interested, and for his own protection from suspicion, he should have taken the precaution to have ascertained its contents before witnesses. I would not, nevertheless, be justified in charging him upon mere suspicion, or evidence of so vague a character as to put the Court to a mere guess. The affirmative of establishing more assets than are acknowledged by the inventory and account, is on the party objecting, and must be proved with reasonable certainty and definiteness. I am not satisfied from the evidence, that the trunk contained any more than is acknowledged by the executrix.

It was sought also, on the testimony of Antonio Boggiano to charge Lewis Ginocchio with the sum of \$600, or \$700, alleged to have been loaned by the testator to Ginocchio. Boggiano's statement is, that two or three months before the death of Longinotto, he applied to him at the instance of Ginocchio, for a loan on account of a candle manufactory in which the latter was engaged ; that Longinotto answered that he had already advanced or lent Ginocchio six or seven hundred dollars, which reply the witness communicated to Ginocchio, who admitted he had had that amount from Longinotto. No one was present at these conversations, and no corroborative evidence has been adduced, so that the proof on this point depends entirely upon the statement of Boggiano. A large number of witnesses were brought to impeach Boggiano, and an equal number to sustain him ; without going into details, I must say that the evidence on this subject has, in my judgment, so far affected the reliance to be placed on his testimony, that it would not be proper to hold the executrix liable upon his statement alone, uncorroborated by any other proof. Evidence of conversations and admissions should at all times be received with great caution if not suspicion, and this consideration comes in with much force when any doubt exists as to the credibility of the witness

## MARRE vs. GINOCCHIO.

upon whom the entire burden of proving the alleged admission, depends. Besides, Boggiano is a creditor of the estate for a small amount; and he is not competent as a witness in any matter which goes to swell the fund out of which he is to be paid, which is otherwise insufficient.

The only remaining question relates to the copartnership account of the firm of Longinotto and Ginochio, of which the husband of the executrix is the surviving partner. On his wife becoming executrix and taking out letters, Mr. Ginochio filed the consent required by law, and thereupon became jointly liable with his wife. I have recently had occasion to consider the nature and extent of this liability, in the matter of the estate of Abraham H. Van Wyck, deceased, and came to the conclusion that the husband of a married woman, executrix, is jointly liable with her in the Surrogate's Court. The salutary effect of such a rule is abundantly illustrated by the present case. The executrix has no means of enforcing a settlement of the partnership accounts. Her husband is the surviving partner; she cannot sustain an action against him, as at law the execution has devolved on him. There is no mode of investigating these accounts unless at the instance of a creditor or other party in interest, or on an application for a final accounting. In determining how far the executrix is liable for the interest of the deceased in the partnership assets, it becomes incidentally necessary to examine the partnership accounts, in order to ascertain what the interest of the deceased was. As where the surviving partner is also the executor of the deceased partner,—so where the surviving partner is husband of the executrix of the deceased partner, a statement of the partnership affairs is incident to the settlement of the accounts of the executor or executrix; and in a case of *final* accounting is absolutely necessary to a *final* adjustment of the estate. A final accounting is a voluntary proceeding, a submission on the part of the executor, or administrator, of "all questions" connected with the distribution of the estate (2 R. S., 3d ed., p. 159, § 75); and of

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EX PARTE, M'CORMICK.

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course, when the settlement of the accounts necessarily involves the investigation of the partnership affairs, *that* question is submitted with others.

As it was understood on the hearing that, if I should come to this conclusion, an opportunity would be afforded for further examination of the partnership affairs, a day must be appointed for that purpose.

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In the same matter, the partnership accounts having been rendered by the husband of the executrix, and proofs taken, it was found that the estate was sufficient for the payment of all the debts, and a decree was made accordingly.

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## EX PARTE, McCORMICK.

*In the matter of proving the last will and testament of  
JOHN McCORMICK, deceased.*

A MUTUAL or conjoint will, executed according to the Danish law, by husband and wife, then resident in a Danish colony, is valid, though not attested according to the laws of New York.

Such an instrument may be admitted to probate here, on original proof of the handwriting of the parties, notwithstanding there are no subscribing witnesses.

The law of the testator's domicile at the time of his decease, governs in respect to his testamentary *capacity*—so far as relates to moveables. But in regard to the *solemnities and forms* requisite to the due execution of a will of personalty, if the method of execution conform both to the law of the domicile at the time of execution, and to the law of the place where the act is performed, the will continues valid, though

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EX PARTE, M'CORMICK.

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there be a subsequent change of domicile, and by the laws of the new domicile different forms are required.

A provision in a mutual will, that the survivor shall remain in full possession of all the estate, without the interference of any court, has the effect of devolving upon the survivor the whole administration of the estate. It is a constructive executory appointment according to the tenor.

**THE SURROGATE.** This is a conjoint or mutual will, executed by the decedent and his wife, at the island of St. Croix, a Danish colony, where the parties were then resident. The instrument received the usual official confirmation, at the time of its execution, and since the death of the testator, his widow has been admitted to the succession of his property under the will, by the decree of the Royal Dealing Court at Christianstadt. The testator died at New York, and the will not having been subscribed or acknowledged in the presence of subscribing witnesses, according to the requisitions of our law, cannot be sustained unless on the ground of its validity according to the foreign law. This instrument was executed in conformity to the Danish law, and though the decree of the Dealing Court, being made on the production of a copy of the testament, and being a mere admission of the widow to the right of succession, is not such a probate of the will as would justify its proof here on the certificate of those proceedings, yet there is no reason why original proof should not be taken before me. The effect of a *change* of domicile, after a will of moveables has been made in pursuance of the forms required by the laws of the first domicile, but not in conformity to the law of the last domicile, has been the subject of some difference of opinion among the civilians. The rule appears now to be well established, that the law of the testator's domicile at the time of his decease, governs as respects his testamentary capacity. (*Story, Conflict of Laws*, § 473.) But in regard to the solemnities and forms pursued, if they agree both with the law of the domicile at the time of execution, and the law of the place where the act is per-

formed, the continental jurists are agreed that the act is valid, though there be a subsequent change of domicil, and by the law of the new domicil, different forms are required. (*Burge's Com. For. & Col. Law*, 4 p. 581, *et seq.*) Some provisions of our statute recognise the *lex loci actus*, in regard to wills of personal estate, "duly executed by persons residing out of this state, according to the laws of the state or country in which the same were made" (2 *R. S.*, 3d edition, p. 132, § 83, 84); and in respect to such instruments, authority is given to the Surrogate on the production of the foreign probate, to issue letters testamentary thereon. These sections admit the validity of certain instruments executed according to the *lex loci actus*, though they do not justify the idea that the law of the place where a will happens to be made, exclusively prevails so as to render a will invalid that was executed in conformity to the law of the testator's domicil. They were probably designed merely to recognise the validity of wills of persons residing abroad, executed according to the law of the place of execution, and not to be a general adoption of the *lex loci actus* where the will has been executed according to the *lex domicilii*. However this may be, it is very clear that they are not inconsistent with the rule of the civilians, that the foreign testament made according to both the *lex loci actus* and the *lex domicilii*, is valid.

In the present case, therefore, it is immaterial whether the decedent, at the time of his death, had become a resident of New York or not. When he was domiciled at St. Croix, he made his will there, conformably to the Danish law, and it was a valid act, unaffected even by a subsequent change of domicil, if one occurred. Though there were no subscribing witnesses to the will, therefore, as required by our statute, the will was made in due form, and the subscription of the testator having been satisfactorily proved, it must be admitted to probate.

The will declares, that the survivor, during his or her natural life, "shall remain in full and undivided possession"

## STIRES vs. VAN RENSSELAER.

of all the estate, "real or personal, landed property or moveable, nothing whatsoever excepted, without any interference of the Dealing Court or any other authority." This is a common, if not usual provision, in the mutual wills made according to the course of the civil law, and its effect is to devolve upon the survivor the whole administration of the estate. It is a constructive appointment of the survivor, to be executor—an authority implied from the general bequest of the entire estate, "in full and undivided possession." The widow may, therefore, qualify as executrix according to the tenor.

## STIRES vs. VAN RENSSELAER.

*In the matter of the estate of FRANCIS COOPER, deceased.*

THE testator gave a moiety of the residue of his estate to his wife, "her heirs and assigns," and the other moiety to the "children" of his late brother and sister, "their heirs and assigns;" and he authorised his executors to sell his estate, and allow his "wife to take the moiety thereof, and pay the other moiety thereof to the children of his said late brother and sister." At the death of the testator as well as at the date of the will, several of the children of his brother and sister were dead,—*Held* that the term *heirs* was a word of limitation and not of purchase, and issue of the testator's nephews and neices could not take.

In case of a bequest to children, as a class, it is a general rule that only those living at the date of the will can take, unless an intent to the contrary those can be deduced from other portions of the will.

When a bequest is made to a class, the death of one before the testator does not cause a lapse, but all those answering the description of the class at the testator's death take the whole.

G. L. ASHMEAD and H. L. CLINTON, *for Claimants.*  
J. BLUNT, *for Executor.*

THE SURROGATE. The testator by his will made the following disposition of his residuary estate: "I do give

## STIRES vs. VAN RENSSELAER.

and devise the one moiety of the residue and remainder of my estate to my said wife, Maria B., *her heirs and assigns*; and I do give and devise the other moiety of the residue and remainder of my estate to *the children of my late brother and sister, deceased, their heirs and assigns*. I do authorise and empower my executrix and executor hereinafter mentioned, to sell and dispose of all my estate (except, &c.) and after paying the incumbrances thereon, to allow my said wife to take the moiety thereof, and to pay the other moiety thereof to *the children of my said late brother and sister.*"

The will was executed March 25, 1850, and at the death of the testator, as well as at the date of the will, several of the children of his brother and sister were deceased, and their children now claim as legatees. Courts always struggle to prevent a lapse where it can be done without violence to well-settled principles of law; and much astuteness and nicety have been exhibited in spelling out from the provisions of the will, such indications of the testator's intention, as may aid in saving the legacy from the operation of technical rules. Thus, the use of the word "or" in a bequest to "A *or* his heirs," has been held to work a substitution of the "heirs" in place of A, where the latter was not alive at the testator's decease. But there is no room for such construction in the present case. The devise of the residue here is to the testator's brother's and sister's "*children, their heirs and assigns.*" "Heirs," is a word of limitation, and there is nothing in the will to shew the testator designed to use it in other than its proper sense. (*Armstrong v. Moran*, 1 *Bradford, S. R.*, 314.) As he gives to his wife "*her heirs and assigns,*" so he gives to his nephews and nieces "*their heirs and assigns,*" and in the subsequent clause respecting payment, he omits those words entirely, directing a moiety to be paid to his "wife," and the other half to "the children" of his brother and sister, there stopping and not saying a word more. There is no room for substituting the issue of a deceased

## STIRES vs. VAN RENSSELAER.

child in the place of its parent, unless that can be done under the word "heirs" in the terms of the original gift, and that is simply impossible, without overturning a well-settled canon of interpretation. (*Crawford vs. Trotter*, 4 *Mad.* 361. *Thompson vs. Thompson*, 1 *Coll.* 388.) Nor can the term "children" be stretched beyond its usual signification, so as to include grandchildren, without aid from some other part of the will. (*Elliott vs. Davenport*, 1 *P. Wms.*, 83; *Corbyn vs. French*, 4 *Ves.* 435.) Independently of these difficulties, which I deem insuperable, the authorities favor the doctrine that generally in case of a bequest to children as a class, only those *living at the date of the will* are entitled, notwithstanding a provision in favor of issue in case of death, unless an intention to the contrary can be deduced from other clauses or phrases. (*Lawrence vs. Hebbard*, 1 *Bradford, S. R.*, p. 252.)

I must hold, therefore, that the issue of the testator's nephews and nieces, not living at the time of his decease, take nothing under the will. If there were an intestacy as to the shares their parents would have taken if living; they, as collaterals, are too remote to take under the statute of distributions. But there is no intestacy, for when a bequest is made to a class, the death of one before the testator, does not effect a lapse of any part of the fund; but all those of the described class, then answering the description at the testator's demise, take the whole. (*Viner vs. Francis*, 2 *Cox* 190; *S. C.* 2 *Bro.*, *C. C.*, 658. *Shuttleworth vs. Greaves*, 4 *M. & Cr.* 38. *Cort vs. Winder*, 1 *Coll.* 320. *Lee vs. Pain*, 4 *Hare*, 250. *Shaw vs. McMahon*, 4 *Dr. & W.*, 431, 438.) The decree must, consequently, provide for the payment of the entire moiety to the children of the deceased brother and sister, who survived the testator.

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REDMOND vs. ELY.

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## REDMOND vs. ELY.

*In the matter of the estate of SAMUEL REDMOND, deceased.*

If executors distribute assets, in kind, among the legatees, guaranteeing their collection, and subsequently proceed to a final settlement of their accounts and a distribution of the remainder of the estate, resort must be had, in case of loss, to their individual guaranty, after a decree has been entered on the final accounting.

Service of citation *viis et modis*, i. e., by publication in the case of a non-resident, is a constructive service that concludes the party but not the court, and on sufficient grounds the decree may be opened, to obtain substantial justice.

A decree on final accounting will not be opened, unless upon proof that no *laches* was committed, and on such a statement of the alleged error as shall indicate the nature and sufficiency of the grounds for appealing to the equity of the court.

P. T. WOODBURY, for Petitioner,

D. D. LORD, for Executors.

**THE SUREGATE.** This is an application by Alexander Redmond, a legatee, to open the decree on the final accounting of the executors, entered July 25, 1848.

In November, 1846, the petitioner received, on account of his share of the estate, four notes of Herman Morris for \$1,200 each, at 6, 9, 12, and 15 months from November 1, 1846. Morris had purchased part of the assets, and was indebted to the estate upwards of seven thousand dollars. The allegation is, that the notes were taken on the assurance of Mr. Selden, one of the executors, that Morris was perfectly responsible, and if the notes were not paid "when they fell due, the executors would take them back." Samuel R. Forman states that in *the summer of 1846*, at an interview between Selden, Redmond and himself, Mr. Selden told him privately and apart from Redmond, that if

## REDMOND vs. ELY.

the latter would take certain notes made by Morris, the executors would receive them back if they were not met at maturity. He says that no agreement was made while he was present, but he communicated Mr. Selden's offer to Redmond, after leaving the office. Among the vouchers is Redmond's receipt dated July 6, 1846, for Morris's note at 90 days for \$450; and Mr. Ely one of the executors, states that notes of Morris to the amount of \$900 were taken by Redmond in the summer of 1846. Mr. Forman's statement may relate to this transaction, and not to the arrangement in November following. Mr. Selden being in Europe, his explanation has not been laid before me. In any event, Forman expressly says that no agreement was made at the time of which he speaks, and there is no other evidence in the case except the affidavits of Mr. Redmond, the applicant, and of Mr. Ely, the executor.

Mr. Redmond states that *soon after* the interview between himself, Forman and Selden, at the office of the latter in *the summer of* 1846, he called on Mr. Selden, stated what had been communicated by Forman, and Mr. Selden confirming Forman's statement, he consented on these terms to take Morris's notes for \$5,000; that the first two of the notes were paid, and the last two were not, whereupon he forthwith called upon Mr. Selden and requested him to take the notes back, which Mr. Selden refused, and directed him to do what he thought best with them. He afterwards received partial payments from Morris, and, March 1, 1849, renewed the notes. Morris died in the summer of 1849, insolvent, and his executors paid a dividend on the claim, leaving \$1,430.18 still due, exclusive of some arrears of interest. Redmond alleges also that he had no notice in fact of the final accounting and was not aware a decree had been entered until January last.

Mr. Ely on the other hand states, that in 1846 he was residing in Ohio, and Alexander Redmond and Mrs. Lucretia Redmond, the principal legatees, being anxious to have a final settlement of the estate, he came on to New

## REDMOND vs. ELY.

York for that purpose, and an agreement was effected principally through his negotiation, by which Mrs. Redmond was to take property of the estate at a certain sum, and Mr. Redmond to accept notes of Morris for \$5,000; that the time the notes were to run was entirely arranged between Redmond and Morris, and they were drawn and delivered by Morris directly to Redmond, without the intervention of the executors; that when the last two notes fell due he accompanied Redmond to Mr. Selden's office, where Redmond asked Mr. Selden to take back the notes; that he did not pretend an agreement to that effect; and that Mr. Selden "expressly refused to take said notes, stating that the sole object of having him take them was to carry out an arrangement to wind up the estate." That the notes were received in accordance with a plan to settle the estate, is apparent from the whole transaction; and, indeed, Mr. Redmond himself says the executors urged him to take the notes, as "that by so doing the estate would be readily and more easily closed." There was nothing singular in such an arrangement, for I find on examining the vouchers, that Redmond had been in the habit, as far back as March, 1841, of receiving various sums on account of his share, by the hands of Morris. In August and December, 1845, he took the executors' drafts on Morris for \$1,500, and in July, 1846, he received the note of Morris for \$450 at three months.

Mr. Ely expressly denies any knowledge of the alleged agreement to take the notes back if they were not paid; and, as the object was to wind up the estate, and have a final distribution, such an understanding would have been inconsistent with that design. In this view of the case, I do not regard such a transaction so much in the nature of a payment, as a distribution of assets in kind; and if on such a distribution the executors have made themselves personally liable by an individual guaranty, resort should be had to that guaranty, when the accounts have been finally closed, and when the legatee has been dealing with

## REDMOND vs. ELY.

the property so taken by him, for several years, as if it were his own, without attempting to stop the distribution of the remaining assets to the other party in interest. The notes fell due four years ago, and so far as the estate or the executors are concerned, this is the first step taken by Mr. Redmond for the enforcement of his supposed rights. Besides, Mr. Ely testifies that Redmond "was fully informed" by him, "of the proceedings of the executors to render their accounting in July, 1848;" that he came to New York "with counsel, and examined the account proposed to be rendered and made inquiries of the deponent as to items thereof, and never stated, or expressed or signified to the deponent any objection to the same." Redmond resided in New Jersey, and the citation for final accounting was published in the state paper once a week for three months; and the allegation of Redmond that he had no notice in fact of the proceedings, is contradicted by one of the executors. The service of a citation *vis et modis*, as it is termed, is a constructive service that concludes the party, but not the court, and on good and sufficient grounds the proceedings may be opened to get at the substantial justice of the case (3 *Phill.*, 512). To rescind the conclusion of a cause before or after sentence in order to fresh matter being pleaded, requires proof that no *laches* was committed, and that the measure prayed is one essential to the ends of justice. The application is one addressed to the equity of the Court, and will not be granted without very special reasons, and such a statement of the alleged error as shall indicate the nature and sufficiency of the grounds. (2 *Add.*, 267. 1 *Hagg.*, 88. 2 *Curt.*, 630. 3 *Ibid.*, 119.) The decree in the present instance was pronounced in July, 1848: it was a final decree settling the rights of other parties interested in the estate, and after such a lapse of time I should be disinclined to disturb it unless upon a very strong case. I am not satisfied that injustice has been done, and the application must therefore be denied.

CONKLIN vs. MOORE.

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## CONKLIN vs. MOORE.

*In the matter of the Estate of GEORGE DOMINICK, deceased.*

THE will gave the testator's daughter E. the use of certain property for life, and on her decease, directed a sale and the distribution of the proceeds. Among the legacies was one to M., to be paid to her "in small sums from time to time," at the discretion of the executors. The legatee survived the testator, but died before the life-tenant. *Held*, that the direction to convert into money was absolute; that the interest of the legatee in the remainder, after the termination of the life estate, was not contingent on her surviving the life-tenant, but she took a vested legacy on the testator's death, which, in case of her decease before payment, passed to her legal representatives. *Held*, also, that the discretion of the executors, in respect to the legacy to M., related to the time and mode of payment, and did not prevent the vesting of the legacy.

SHEPARD & VOSE, for Petitioner.

E. C. BENEDET, for Executors.

THE SURROGATE. The testator, after giving his daughter Elizabeth the use of certain property, real and personal, for the term of her natural life, directed that "upon her death," "or as soon thereafter as may be with convenience and advantage to the persons interested," the estate should be sold, and "out of the proceeds thereof the following legacies be paid, to wit, To Margaret, daughter of my son George, &c., two hundred and fifty dollars, to be paid by my executors into her own hand, and upon her own personal receipt, and in small sums from time to time, at the discretion of my executors."

Margaret Redstone, the legatee, survived the testator, but died before the decease of Elizabeth, the life-tenant. Her administrator now applies, on the expiration of the life-estate, for the payment of the legacy. The direction to sell

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CONKLIN vs. MOORE.

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the estate and convert it into money is absolute ; so that the property is to be considered as personalty, out of which, after the termination of a previous interest, the legatees are to be paid. It is substantially a gift for life to E., with remainder in certain proportions or sums to other persons. This class of legacies in remainder does not depend on the contingency of the legatees surviving the life-tenant. The rule in such cases is, that the interests of the first and subsequent takers all vest together on the death of the testator. I am, therefore, of opinion that the legacy of two hundred and fifty dollars to Mrs. Redstone was vested. The particular directions as to its payment into her own hand, on her own personal receipt, and in small sums from time to time at the discretion of the executors, do not affect the vesting of the legacy. The legatee being a married woman, the intention was to provide securely for her enjoyment of the sum bequeathed, and the discretion given the executors relates only to the time and mode of payment. Her administrator is now entitled to an order for the payment of the whole sum, with interest from the decease of Elizabeth, the testator's daughter.

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MASON vs. JONES.

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## MASON vs. JONES.

*In the matter of the estate of JOHN MASON, deceased.*

On allegations filed within a year after probate, the Surrogate confirmed the probate. An appeal was taken to the Circuit Judge, and he affirmed the Surrogate's decision, and an appeal was taken to the Chancellor, which, under the new constitution, was heard and determined by the Supreme Court. The decisions of the Surrogate and the Circuit Judge were reversed upon questions of fact, and the Supreme Court directed a feigned issue, to try the validity of the will. *Held*, that until a final decision, the case remains with the appellate court; and that the decree reversing the orders of the Surrogate and the Circuit Judge, and awarding a feigned issue, was not a final decision.

The Supreme Court having authority to reverse or affirm the judgment, or to retain the case for the purpose of making such further order as might be just, or remit it to the inferior tribunal for that purpose; and having in the present instance, after reversing the orders appealed from, directed a feigned issue, no order can be made by the Surrogate until a final decision of the case, upon the merits, by the appellate tribunal.

GEORGE WOOD and J. J. RING, *for Petitioner.*

D. LORD and M. J. BIDWELL, *for Executors.*

JUNE, 1851.

INGRAHAM (*First Judge of the Common Pleas, acting as Surrogate.*) This petition is presented to the First Judge of the Common Pleas, acting as Surrogate, in consequence of the relationship of the Surrogate to one of the parties in interest, and asks for a revocation of the letters of probate, heretofore granted by the Surrogate on the will of John Mason, deceased. On the 20th June, 1842, the probate of the will before-granted was confirmed by the Surrogate. An appeal was taken from the Surrogate to the Circuit Judge, by whom the decision was also affirmed. The parties again appealed to the Chancellor, which appeal was heard, pursuant to law, before the general term of the

Supreme Court, and on that appeal the order of the Surrogate, admitting the will to probate, and of the Circuit Judge affirming such order, were each of them reversed upon questions of fact. Had the order or decision of the Supreme Court ended with reversal, there would be no doubt of the propriety of granting this application to revoke the letters of probate, and to appoint an administrator of the estate. But the Supreme Court, at the same time, further ordered, that, inasmuch as such reversal was founded upon a question of fact, a feigned issue be made up between the parties, to try the question arising upon the application to prove said will. It is apparent from this order, that the Supreme Court did not intend to dispose finally of the case, inasmuch as by the order they evidently intended to exercise the power which, by statute, is conferred upon the Circuit Judge, for the purpose of trying before a jury the validity of the will, and, if sustained, of sending it back to the Surrogate for probate again. It is contended on the part of the petitioner, that the portion of the order made by the Supreme Court, directing a feigned issue, is erroneous and void, and, therefore, that the whole decision of the Court is a mere reversal of the judgment appealed from. The propriety of asking an inferior tribunal to decide upon the validity or regularity of proceedings in the appellate court, to whose decisions obedience is to be yielded, may well be doubted. My acts in this matter are now subject to review by the Supreme Court; and I should hesitate very much before I would undertake to decide that the decision of that Court in this matter is erroneous. Nor is it clear that the view taken by the petitioner's counsel, of this order, is correct. Although the Chancellor may not have had the power to order a feigned issue to be made, still it is to be remembered that the Supreme Court is now vested with all the powers of Circuit Judges, as well as of the Court of Chancery; and when the decision of reversal, if enforced without the accompanying order for a feigned issue, would be conclusive as to the validity of the will so far as relates

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MASON vs. JONES.

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to the personal property, the power, if it does exist, of making such an order, should clearly be exercised. It is also said that this order is one which could not be appealed from, and the case of *Reid vs. Vanderheyden*, 5 *Coven*, 719, is cited as authority to that effect; but that case shows that this portion of the order, now objected to, may be appealed from; because there, the Court of Errors reversed just such an order for a feigned issue, made by the Court of Chancery for the same purpose. From the views above expressed, it will be seen that it is unnecessary for me, at the present time, to pass upon the merits of this motion. Until, by an application to the Supreme Court to modify the order made by them, or a reversal of it by the Court of Appeals, or the disposition of the question on a feigned issue, some final decision is made, it would be premature in the Surrogate, or the First Judge acting in his place, to make any order interfering with the action of the Supreme Court in this matter. Reserving, therefore, any expression of opinion upon the merits involved in this application, until the Supreme Court shall make a final disposition of the case, I deny the application, for the cause above stated.

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*In the same Matter.*

JULY, 1852.

The petition in this matter was originally presented to me last year, praying for the appointment of an administrator on the estate of John Mason, deceased, and a revocation of the letters testamentary, issued upon the supposed will of Mr. Mason. This application was made to me, in consequence of a decision of the Supreme Court, declaring that the paper writing purporting to be the will was not sufficiently proved, and directing the decision of the Surrogate to that effect, and the decision of the Circuit Judge affirming the decision of the Surrogate, to be each of them reversed. The order proceeded to award a feigned issue,

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MASON vs. JONES.

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to try the validity of the will. It was contended on behalf of the petitioner, that the latter part of the order, directing a feigned issue, was void, because the Court had no power to make such an order, after reversing the judgment; and therefore, that the decree of reversal was conclusive between the parties. In deference to the Supreme Court, I refused to express any opinion on the merits, upon the ground that an application should be first made to the Supreme Court, to correct any such error in the form of giving their judgment (if it existed), before an inferior tribunal was required to review the propriety of such decision. This application has since been made, and the Supreme Court, in answer to it, have decided that the order was properly entered, and as it was not appealed from, was binding on the parties, and could not be reconsidered or altered. The petitioner has again renewed his application, and it becomes necessary for me now to decide upon the merits of the application. The application to admit the will to probate was originally made in 1839, and the decision of the Surrogate thereon was confirmed by him in June, 1842; from which decision an appeal was taken to the Circuit Judge, who affirmed the decision of the Surrogate, whereupon an appeal was taken to the Chancellor. By the change in the organization of the Courts, the duty of deciding on the appeal devolved on the Supreme Court, when the decision was made by them reversing the former decisions of the Surrogate and Circuit Judge, and directing that a feigned issue should be made up to try the validity of the will. That such an order could have been made by the Circuit Judge is not only conceded, but it must be admitted that such an order was required from him in all cases in which he decided to reverse the Surrogate's decision upon a question of fact. (2 *R. S.*, p. 609, § 98, and 2 *R. S.*, p. 66, § 57.) Upon an appeal to the Chancellor, he was required to hear the same in the manner other appeals from the Surrogate were heard. (2 *R. S.*, 610, § 103.) In all other appeals from the decisions of Surrogates, they

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MASON vs. JONES.

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have been generally heard and decided without the aid of a jury. It does not, however, follow that the Chancellor could not have ordered a feigned issue in any case of that nature before him; on the contrary, the effect of such an appeal being to carry up the whole case from the Surrogate's Court, the Court of Chancery had full power to resort to any mode within the powers of the Court for the purpose of ascertaining the facts necessary to a decision thereof. So far, therefore, as the Court of Chancery had control of this case on the appeal, there can be no doubt that until that Court had finally disposed of the case on its merits, the power of that Court over the whole matter continued; and when so decided, the Court still had power to render the proper judgment, or remit the proceeding to the Court below for that purpose. As the Supreme Court now holds the jurisdiction over this matter in the same manner as the Chancellor, that Court, of course, possesses the same powers over it. The Supreme Court also possesses the power the Circuit Judge had on these appeals, and the powers heretofore vested in the Circuit Judge and the Court of Chancery are now all united in the one court. It is proper, however, to remark, that the powers of the Court, while acting on an appeal originally taken to the Chancellor, are not to be confounded with the powers which that Court might exercise if the appeal was directly from the Surrogate, and that the union of these powers in the Supreme Court is not material to the decision of this question, except so far as the same might be involved in the execution of the order directing the feigned issue, and rendering an order remitting the cause to any other tribunal for the trial of such issue unnecessary. When the appeal is to the Circuit Judge, his powers are strictly defined by the statute; he can only affirm or reverse the decision of the Surrogate. He has no power to make any other judgment, or in any way to modify the decree of the Surrogate. But it is not so when the appeal is from him to the higher courts. Nothing in the statute limits their right of controlling the case, or of giving such

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MASON vs. JONES.

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final judgment therein as those courts think proper. The statute does not direct any form of decision, but leaves to these courts all the powers which, as appellate courts, they possess in other actions. On appeals, therefore, of this nature, the Chancellor became vested with jurisdiction over the entire case, and had authority to proceed with the same, and make such a final order or decree as to him should seem proper. And such power is now lodged in the Supreme Court. It would only be after a final decree in the case, upon the merits, that the Surrogate could be called upon to act either in favor of or against the will. Until such final decision is made, the case still remains with the appellate court. The order of the Supreme Court reversing the decision of the Surrogate and Circuit Judge is not, in my judgment, such a decision. It does not decide that the will is invalid, but reverses the decisions below, and gives as the reason that the will has not been sufficiently proved. If the judgment of that court had not only reversed the decision of the Surrogate and Circuit Judge, but had also declared that the paper writing was not the will of the deceased, the case would have been entirely different. After such a judgment there would have been no propriety in ordering a trial by a jury, because the first decision upon the merits would render such a trial useless. There is also some room to doubt whether the order, as made by the Supreme Court, can in any event be considered as beyond the power of the Court. It is a settled principle that appellate courts, unless limited by statutory provisions, have the power to give the judgment which the inferior tribunal should have rendered. (11 *J. R.*, 141; 4 *Wend.*, 95; 5 *Hill*, 507.) Thus we have appellate courts reversing judgments merely, leaving the parties to commence a new action; or, in addition to reversal, ordering judgment for the appellant, thus ending the case; or reversing a judgment of the inferior courts, and retaining the case in the appellate court for subsequent trial or hearing; or giving the judgment for the appellant, and sending the case back to the inferior tri-

## MASON VS. JONES.

bunal for a new trial or hearing. There is nothing in the statute which would prohibit the Chancellor, when the appeal was to that Court, from a final disposition of the case upon the merits. He was required to proceed on the appeal as in other appeals from Surrogates, but he was not limited to a mere reversal of the decree below. See *Haydock vs. Allen, Hop.*, 352, where the Chancellor reversed the decision of the Surrogate, and retained the case for further hearing.

This decision, as I have heretofore intimated, was the order which, in the opinion of the Supreme Court, the Circuit Judge should have made; and they have made the same order that he should have made. In addition to this, the effect of their order is to send it back to be heard and disposed of at a Circuit Court, in the same manner as if the appeal was pending before the Circuit Judge. In the case of *Lispenard's Will, 26 Wend.*, 255, in which the Court for the Correction of Errors reversed the decision of all the courts, Judge Bronson proposed precisely such an order as was made here, viz. merely reversing the decisions below, and ordering a feigned issue in the court below. In that case, although the point was argued by the counsel, yet no one of the judges doubted as to the power of the Court to make such an order; and Justice Bronson expressly stated that that Court had power to give the same judgment as ought to have been given by the court below. (*p.*, 322.) My conclusion is, that the appellate court has authority to affirm or reverse the judgment appealed from merely, and leave the parties to commence anew in the court below; or, if that court so determine, may retain the case for the purpose of making such further order and decree as to that court may seem proper, or may remit it to the inferior tribunal for that purpose. In the present case, the Supreme Court, having reversed the decree appealed from, directed the issue to be tried, and either, as the appellate court, may retain the cause for a further decree therein, or may treat it as if remitted to the Circuit Judge for the trial

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M'SORLEY vs. M'SORLEY.

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of the issue. As all the powers of that officer are now vested in the Supreme Court, either course might be within the powers of that Court; and until a final decision upon the merits shall have been made by that Court, no order can, with propriety, be made by the Surrogate, as asked for by the petitioner. What may be the result of such action on the part of the Supreme Court, it is not for me now to decide. Whether the Surrogate would be bound, upon the finding of the jury being certified to him, to follow the provisions of the statute which regulate such proceedings when pending before the Circuit Judge, or whether the Supreme Court, after the trial of such issue, should make a final judgment or decree in the matter, must be left for future determination. The questions under consideration are by no means free from difficulty; but my conclusion is that my duty is best discharged by a denial of this application.

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## McSORLEY vs. McSORLEY.

*In the matter of proving the last will and testament of  
JAMES McSORLEY, deceased.*

THE testator was a man of intemperate habits, and at times his conduct indicated signs of mental aberration. A will was prepared for him when in a state of insensibility, without any previous direction or knowledge,—during a temporary revival to a state of consciousness, its execution was not attempted—but on a relapse, it was engrossed, presented to him and read, and he was asked if it was right, and he answered, Yes. It was then executed, the decedent making affirmative answers to the formal questions put to him touching the testamentary declaration, &c. Held that under the circumstances and in the absence of any clear and satisfactory proof of instructions and intentions, probate must be denied.

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M'SORLEY vs. M'SORLEY.

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THOS. L. WELLS, and WM. R. STAFFORD, for Executor.

I. The testator had testamentary capacity.

1. His habit of drinking had not destroyed or impaired his capacity to do business or execute a will. The law presumes him capable till the contrary is made out. The opposing witnesses testify to no *facts* showing loss of mind. They give their opinions only, formed from occasional conversations and eccentric behavior. (2 *R. S.*, p. 2, § 1; 5 *J. R.*, 144; *Jackson v. King*, 4 *Cowen*, 207; 26 *Wend.*, 293, *ib.* 317; 21 *Wend.*, 142; 24 *Wend.*, 85.

The testimony in favor of his capacity is supported by facts, and the opposing witnesses corroborate it by proving business transactions and conversations with him, as a man of sound mind.

The opinions of witnesses as to mental capacity, unaccompanied by *facts* and circumstances to support such opinion, are entitled to very little weight. (26 *Wend.*, 291, 309, 298.)

2. His mind was sound and clear, and he was calm and collected when he executed the will. There is no evidence that he exhibited any loss of mind during the last week of his life; on the contrary, the majority of the witnesses show that he had recovered from his attack, and fully understood what was transpiring around him.

II. The will was executed with all the formalities required by law.

III. The will was drawn according to his directions, freely expressed to the witnesses, McIntosh, Caldwell, Mrs. McAdorey and McCann, and afterwards reiterated to Stafford.

IV. There is no proof of undue influence. There was

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M'SORLEY vs. M'SORLEY.

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no importunity on the part of his wife, or by any person on her behalf. There was no deception or concealment in preparing and executing the will. It was done openly in the day, and where many persons were continually coming and going. It was in conformity with his previous arrangements, and with his own expressed wishes.

There was no fraud practised to obtain the will. No art or effort was used to prevent his friends and relatives having free access to him during his illness. The subscribing witnesses had no interest in his estate, and can neither gain nor lose by the result of this matter.

V. The will was a reasonable and fair disposition of his property.

That property was acquired by the joint efforts of his wife and himself.

He had no immediate relatives except his brother, residing in Pennsylvania, and cousin, Thomas McSorley, of the Eighth-avenue, the contestants, with both of whom he was on unfriendly terms, and whose comfortable circumstances did not require his bounty. The will furnishes no reasonable ground of complaint that he preferred his wife to relations with whom he had no friendly intercourse, and to whom he owed no obligations. (*Brown v. Betts*, 9 Cowen, 208 ; 2 *Hill*, 569, *Germond vs. Jones*.)

T. J. GLOVER, for next of kin and heirs.

THE SURROGATE. The will propounded for probate, gives all the estate of the deceased, real and personal, to his wife, Catharine McSorley. He left no children surviving, and his heirs-at-law and next of kin consist of a brother, a sister, and the children of a deceased sister. During the pendency of the present contest, the widow has died, leaving a will disposing of her property, which has been duly proved.

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M'SORLEY vs. M'SORLEY.

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The contestants have endeavored to establish James McSorley's incompetency to make a will. I will consider that evidence after having first adverted to the circumstances attending the execution of the instrument under consideration. On Thursday, the first of May, about noon, the decedent was taken with a fit, and was carried to his bed insensible; on Saturday, the 10th May, about 5 or 6 o'clock in the afternoon, the will was executed, and on Tuesday, May 13th, he died. On Friday, the 2nd of May, whilst he lay in a state of insensibility, a will was prepared for execution, by his counsel, but no attempt was made to have it signed. The instrument was left with Mrs. McSorley, with directions as to the mode of execution, in case her husband should revive so as to be able to make his will.—The evidence shows that in the ensuing week he so far recovered as to get up, with assistance, and to converse with his family and friends. He then relapsed, his counsel was sent for, and the will executed. Mr. Stafford gives the following narrative of the transaction. He states that on the 2nd of May, he went to McSorley's house "to get him to make an affidavit," and learned that he had had a fit and fallen from the stoop on some stones. He found him insensible. McIntosh and McCann, friends of McSorley, were there. The former introduced the subject of a will, saying there ought to be one drawn and ready; "the child was dead, and it was better to have the matter fixed. McCann was present and also alluded to it. I asked them both how the will had better be drawn, and they said there had been a will, and the property was left to his wife and child, and the child was dead; and I got the impression from what they said, that he wished, after his debts were paid, his wife should have his property." "I asked McCann, who had better be named as executors. I think he told me a Mr. Harrison and Mr. McIntosh had been executors in some old will. I drew my own conclusions about who were the proper persons, and left out Harrison. McIntosh did not want to be executor. He told me he would not

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M'SORLEY vs. M'SORLEY.

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be executor. That was when I saw him afterwards, for he had gone away that night before I had finished drawing the will." After drawing the will, Mr. Stafford left it with Mrs. McSorley, giving her directions how it should be executed in case the decedent "came to his senses." He also states that when he drew the will, he was under the impression the decedent "had no immediate relatives," an impression probably derived from nothing being said on that subject. He adds, "After drawing the will and leaving the house, I was walking down to the stage with McCann, and he asked me how I had drawn the will. I told him. He said it was not right. He had a brother in Western New York. It ought to be altered." "He said it was not right, his brother ought to have something. That was the first I heard he had a brother. I said, if he came to his senses he could have it explained to him, and I would draw another if they wished it." A day or two after, Mr. Stafford heard that McSorley was better, but nothing appears to have been done till the 10th of May. He says, in the afternoon of that day, McCann came to his office, bringing with him, as he thinks, the will previously drawn, and told him McSorley "was much worse, and they did not think he would live;" that he was "wanted up there right away." He inquired whether any alterations were to be made, and on being answered in the negative, asked why the will he had left had not been executed. McCann replied they would rather have him there "to see it was all right." McCann, at that time, also requested him to draw an agreement to be executed by McSorley, relative to a building he had erected on some premises leased by him of the decedent. Mr. Stafford says, "I knew of the agreement verbally before, and he wanted to know if I would not get it done when I went. He stated what the agreement was." After the will and the agreement were prepared, Mr. Stafford, as soon as possible, got in a stage, rode to the residence of the deceased, and was at once taken into the back room where he was lying in bed." He says,

## M'SORLEY VS. M'SORLEY.

"I found him, a very sick man indeed, very weak;" "he looked very pale, just on the point of death, and as if he was rapidly declining;" "his bodily condition appeared to be that of a man approaching dissolution. He lay very quiet; did not seem to be in any pain; his eyes were open. He appeared to be calm, conscious and self-possessed." "I thought his state of calmness was owing to the near approach of death. This was when I went in." "He appeared to recognise me, by attending to my conversation." "When I went in, his wife or McCann, told him Mr. Stafford had come, and then I went up to him and shook hands with him; said I was very sorry to see he was so bad, and asked if he knew me. He said, 'Yes you are the boy.' I said, I had been there before, but he was too bad to see me. He said, 'Yes, they told me so.' He then said he was glad to see me." "I said he had met with a very bad accident. He replied, 'Yes, it was very bad,' or 'Yes, it is pretty bad.'" "I told him I had brought a will up, and asked him if it was his desire to make a will, and he said, Yes." "I said, 'I am told you want your debts paid first, and the rest to go to your wife.' He said, Yes. I then told him I had the will that way, and would read it to him." Mr. Stafford then read the will to him, by sections, asking him at each, if that was right; to which the decedent answered, "Yes," three times. He then read the whole will, and asked him if he would sign it.—He said, "Yes." He was then supported in the bed; the pen put in his hand; he attempted to write; said "I can't write;" was asked if he would make his mark, and said, "Yes." Mr. Stafford inquired whether he should write his name, he answered, "Yes." He then made his mark—Mr. Stafford supporting his arm just above the wrist. Both before and after he put his mark, Mr. Stafford asked him whether he signed, sealed, published and declared the instrument to be his last will and testament, and requested them to become subscribing witnesses. He answered, "Yes." Stafford, McCann and Philip McSorley, then

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M'SORLEY vs. M'SORLEY.

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signed; the attestation clause was altered; Stafford returned to the bed, and went through the same forms as before, and he replied, "Yes." Next, the agreement with McCann was executed. Stafford says, "I read it to Mr. McSorley and explained it to him, as I had previously done to his wife, and I asked him if that was the proper document, and he replied, Yes, that was the agreement—that was it. Both he and his wife said so. He and his wife talked about it while I was there. He said he agreed with her, and then I read the document to him." After this, the decedent had a newspaper in his hand, and read part of the title of it: "The New York." It was the Herald. Mr. Stafford adds, "I never saw him more reasonable." "I was surprised to find him so calm, reasonable and collected. I don't know that I ever saw him more so, or when he appeared to understand better what was going on."

It thus appears, that the will of the decedent was prepared without his instructions, at the suggestion of friends, when he was totally insensible; that on a partial recovery no effort was made to effect its execution; and on a relapse, when, according to the statement of one of the subscribing witnesses, "he was much worse, and not expected to live," and as expressed by Mr. Stafford, he looked "just on the point of death," the instrument made by others, on his first attack, and now engrossed without alteration, is presented to him, and he is asked a series of questions, to which he answers, "Yes," "Yes," *toties quoties*, as often as the inquiries are put. "If," says the Touchstone, "some friends of a sick man, of their own heads, shall make a will, and bring it to a man in extremity of sickness, and read it to him, and ask him whether this shall be his will, and he say yea, \* \* the testament is very suspicious." There must, then, be some proof to remove this doubt or suspicion—something, beyond the mere acquiescence of a sick man *in extremis*, to indicate that it was his will, that it conformed to his intention and wishes, that it was an active and not a passive will,

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M'SORLEY vs. M'SORLEY.

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that it was not the act of others and his submission, but his own act.

I have thus far only considered the facts furnished by Mr. Stafford, the most intelligent of the three subscribing witnesses, and who, probably, recollected the circumstances more accurately than the others. Philip McSorley, one of the other witnesses, states that he did not hear the decedent say anything at the time of execution, but that he only bowed his head when asked by Mr. Stafford if he was satisfied that should be his last will. He adds, that he read a few words from the newspaper; and then says, "I cannot say that James had sufficient mind and understanding, to know that he was making his will and disposing of his property after his death."

McCann, the other witness to the execution, states that McSorley's "mind was very good." As he procured at that time, the execution of a document which, if valid, secured to him very important rights, and as the fate of the will and that instrument are indissolubly bound together, it is manifest he is not a very disinterested witness.—Many of his statements are contradicted by Mr. Stafford. He states, that on the 2d or 3d of May, he went, at Mrs. McSorley's request, to Stafford's office, and asked him to come up and draw a will. Mr. Stafford says, he went to McSorley's house that afternoon, on other business, not having heard of the accident. McCann said, there was no will drawn that afternoon, to his knowledge—that he does not think one was written—that he did not leave the house that evening with Mr. Stafford, and did not then, or at any other time, tell him it was not right his wife should have all the property, and that he had a brother, who ought to have something. Stafford says, that he left in company with McCann, and told him how he had drawn the will; and McCann said that was not right, his brother ought to have something. McCann said, that on the 10th of May he did not see any will already drawn at Mr. Stafford's office, and, although he had previously testified that he did not know

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M'SORLEY vs. M'SORLEY.

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how it was drawn, subsequently stated that he gave the directions. Mr. Stafford stated that McCann, brought the will drawn by him on the 2d day of May, to his office, and on being asked whether any alterations were to be made, answered in the negative. It is useless to follow this witness through his tortuous testimony ; but it is enough to say, that he differs on so many points from the statements of Mr. Stafford, as to leave the latter the only reliable authority for the facts attending the preparation and execution of the will.

So far, it is apparent that the will did not emanate originally from the deceased. McCann, however, states that on the morning of the 10th of May, he was sent for by Mrs. McSorley, who thought her husband was getting worse. He went. "His wife asked him if he would not settle his affairs. He said he wished they were settled. She asked in what way he wished to have them settled.—He said, First pay my debts, and the remainder will be yours." \* \* "She asked him if I should go for Mr. Stafford ; he said, Yes : that was all, and then I left."

Mrs. Ellen McSorley testifies that on Friday, the preceding day, his wife "wanted him to make a will," and she adds, "So did I too, as well as she. She said that to him more than once. He said he did not want to make a will ; that he had never wanted to make a will. I wanted him to get the old will and make a new one. He said, No, he did not want to make any will at all." \* \* "That it was quite different with him now, when his child was dead ; that he wanted no will." This statement is contradicted, though the witness names two persons who were present at the conversation.

I have not overlooked, in this connection, the evidence of Caldwell, Mrs. McAdorey and McIntosh. Caldwell says, six months before his death McSorley told him he would make a will similar to his first will. Mrs. McAdorey states that in the morning of the 10th of May, he said he was going to have his affairs arranged. McIntosh testifies, that

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M'SORLEY vs. M'SORLEY.

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two or three days before his death, McSorley stated to him that he wished his debts paid, and his wife to have the remainder. He puts this interview at the time he first heard he was sick, and says he did not see Stafford and McCann there; and yet it is proved that on the second of May, he met McCann and Stafford at McSorley's house, eight days before the will was executed. I see no satisfactory proof of McSorley's testamentary intentions, in the evidence of these witnesses.

There are many other facts contained in the voluminous mass of testimony before me, by no means immaterial, and yet hardly of sufficient importance in the view I take of the case, to need comment. The general features of the transaction, are these:—The execution is sustained by one reliable witness only, and the facts, as stated by him, show mere passive acquiescence, and not any will or active intelligence. The probability is, that with the familiar countenances of his wife, his friend McCann, and his counsel, the testator would have signed any paper presented to him. The agreement signed for McCann, by which he bound himself to pay for buildings on leasehold premises, for which McCann had not a shadow of legal title, might as well have been a deed of all his property—or the will might as well have made another disposition of his estate—for aught that he directed. He was asked if he would do this, and he said yes—and if that was right, and he said yes; and so it went on through the entire ceremony.

Now, such a transaction might possibly be supported by testimony of instructions and intentions, but there is not only no reliable proof of such, but there is evidence uncontradicted, that the day before, when he was not so ill, he refused to listen to the importunity of his wife, who urged him to make a will.

In the case, then, of a man who, when in health, had been of sound mind and good habits, a will prepared and executed *in extremis*, under the circumstances attending this, would not be deemed validly executed. His mere ac-

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M'SORLEY vs. M'SORLEY.

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quiescence, when in a dying state, almost speechless, able only to respond by saying yes, or a few words more, fast failing, and a few hours afterwards become insensible—would not be sufficient to establish a will concocted wholly by others without his privity, brought to him ready drawn, and passed through the statutory ceremonials by questions and answers—answers that might have been made by a child.

But when, in addition to this, we find that McSorley, when in health, was not a man of good habits or of a well regulated mind—and that if the testamentary act in question, instead of being consummated on his death-bed, had been performed when in his ordinary state of health, it would still have been a question of grave doubt whether he was competent to perform it,—I think there should be no hesitation in rejecting this will.

Without entering into details, or touching upon controverted points, the following facts seem abundantly established.

He was a man of grossly intemperate habits, which grew upon him until they had reached such a height, that he would rise oftentimes at night, leave his bed, and go down stairs to drink. Whether from original weakness of mind, increased by intemperance, or from the latter cause alone, he at times indicated numerous symptoms of mental disorder. It is in proof, that on various occasions he behaved in the most violent and irrational manner. He whistled, shouted, wagged his head, cut extraordinary capers, whirled a staff round his head, turned somersets, paraded his shop, and marched in the street with a broom or a codfish trimmed with ribbons, strung across his shoulders, going through martial exercises. On meeting friends in the street, he tossed up his hat, flourished his stick, and knocked off their hats. He had a keg of powder in his store, and would lay a train along the counter and fire it off. He would fire off his gun at all hours of the night, in the house or in the street. His language was absurd, fool-

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M'SORLEY vs. M'SORLEY.

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ish, rambling and incoherent. He was found late at night in the street, some distance from home, without hat or coat, howling or yelling, and was taken home several times by the police. There was much testimony heard on this subject, but I do not think it material to recapitulate it.— Many witnesses were also sworn to establish a rational state of mind and competency to transact business and make a testamentary disposition of his property. Taking the whole testimony together, the result seems to be, that while at times he was capable of making a bargain or protecting his interests, at others he was a madman. His intemperate habits were undoubtedly connected with these changes, his violent and insane conduct being occasioned either by gross excess, or as often happens, by occasional abstinence. It is enough to say, however, that if such a man was capable of making a rational will, the fact that at the time of the testamentary act, he was in the full possession of the little reason he ordinarily had, must be incontrovertibly established, and the will itself must be shown to be an active, and not a passive performance—to have been directed by him and to have been in conformity to his wishes and intentions. Nothing of this kind satisfactorily appears.— In his best estate, his capacity was doubtful; the will, prepared when he was insensible, was not presented when he had partially revived from his first attack, and was only brought to him as he was relapsing into unconsciousness. Under all the circumstances, therefore, I think justice requires that the instrument should be refused probate.

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HORTON vs. HORTON.

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## HORTON vs. HORTON.

*In the matter of the Real Estate of JOSEPH H. HORTON,  
deceased.*

On the motion to confirm the report of sale, in proceedings for the sale of the real estate of a deceased person for the payment of his debts, if it appear that a sum exceeding ten per cent. on the bid, exclusive of expenses of a new sale, can be obtained, it is the duty of the Surrogate to vacate the sale, and direct another to be had. If such an advance cannot be obtained, and the sale has been legally made and fairly conducted, the Surrogate is imperatively required to confirm the sale.

A. BOARDMAN, *for Administratrix.*

D. HARRISON, JR., *for Heirs.*

THE SURROGATE. The sale in this case does not appear to have been illegally made or unfairly conducted, and there is no evidence that the sum bid for the three lots was disproportioned to their value. If a sum exceeding the bid ten per cent., exclusive of the expenses of a new sale, could be obtained, it would be my duty to vacate the sale, and direct that another be had. Unless such an advance can be obtained, the Surrogate is imperatively required to confirm the sale, provided it was legally made and fairly conducted. (2 R. S., 3d ed., p. 168, §§ 33, 34.) On referring to the price brought by other lots on the same plot at the same sale, I should judge that these three had been sold for their full value, taking into view their assignment as the dower estate of the widow of the intestate. Whether they ought to have been sold separately or together should have been questioned before the sale. They are described together in the petition and in the order of sale. They were set apart to the widow for dower jointly together;

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DOMINICK vs. MOORE.

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and a doubt as to the propriety of their disposition in this manner is first suggested before me, after the sale had been effected. I am inclined to think that they have brought quite as much, if not more, sold together, as they would have produced if sold separately. The sale of lot 133 would be clearly insufficient to pay the debts and expenses, inclusive of the costs; and one, if not both, the other lots would have to be sold. The purchaser of three lots on Flushing Avenue has not yet accepted his deed; and if a resale of those premises shall become necessary, it may be more doubtful than ever if any surplus will remain after paying the debts. I can therefore see no objection to the confirmation of this sale.

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DOMINICK vs. MOORE.

*In the matter of the estate of GEORGE DOMINICK, deceased.*

AFTER the expiration of a life estate, the will directed the sale of the property and the payment of several legacies, and then gave one half of all the residue of the estate to P. D. and her six children, "and to the survivor and survivors of them." P. D. survived the testator, but died before the life-tenant; and it was held that her legacy did not lapse.

The general rule is, that all legacies vest on the testator's decease, and to prevent the vesting the contrary intention must be clear. A clause of survivorship is ordinarily referable to the same period—the death of the testator—unless the distribution is postponed till the determination of a life estate, in which case the weight of authority *seems* to incline in favor of referring the survivorship to the period of distribution.

The gift of a general residue, and not merely of the remainder in a particular portion after the death of a life-tenant, does not constitute an exception to the general rule; but in such case the bequest vests on the testator's decease, although a portion of the subject matter is a remainder after a life estate.

SMITH BARKER, *for Petitioner.*

E. C. BENEDICT, *for Executor.*

## DOMINICK vs. MOORE.

THE SURROGATE. The will of the deceased gave his daughter Elizabeth a life estate in certain real and personal estate, and on her death directed a sale and the payment of several legacies out of the proceeds. The remainder was disposed of as follows : " All the rest, residue and remainder of my estate, whether real or personal, in law or in equity, I give, devise and bequeath as follows, to wit, 1. One half thereof to my beloved son, James W. Dominick, his heirs, executors, administrators and assigns forever. 2. The other half to Philena Dominick, widow of Francis John Dominick, deceased, and her six children, to wit, George, James Blanchard, Francis Nostrand, William Hudson, Ann Elizabeth, and Elizabeth, *and to the survivor and survivors of them*, and to their heirs, executors, administrators and assigns forever, share and share alike."

Philena Dominick, after the death of the testator, assigned her interest under the will to Francis Nostrand, her son, and died previous to the decease of Elizabeth Dominick, the life-tenant of a portion of the estate. It is claimed on the part of some of her children that the interest of Philena was subject to a right of survivorship in them, and that in consequence of her decease before that of Elizabeth, the life-tenant, her assignee takes nothing in her right. This proposition depends entirely on the time or contingency to which the clause of survivorship was intended to refer ;—if to the death of the life-tenant, in that case only the survivors of Elizabeth take—if to the death of the testator, all the legatees surviving the testator take vested interests, capable of disposition and transmission, though the legatee die before the time fixed for possession or enjoyment of the legacy.

As a will takes effect on the death of the testator, unless by special direction otherwise, the general rule is that all legacies vest at that time ; and to prevent the vesting, there must be evident a contrary intention, in clear language. For the same reason, it was at one time established by a long series of decisions, that a clause of survivorship is ordinarily referable to the death of the testator—that is,

## DOMINICK vs. MOORE.

to the time of the vesting of the legacy, and not to the time of distribution or payment, unless very clear words sustained the latter application. Subsequent adjudications have impaired the force of this canon of construction; and in relation to *personal* estate, the weight of authority is thought to be in favor of applying the survivorship to the time of distribution, when, after the determination of a life estate, the fund is given to a number or a class as tenants in common, *and to the survivors of them*. It is not necessary, however, to pass upon that question, or attempt to deduce some general rule from the inconsistent and conflicting cases. In the present instance, the gift is of a general residue—real and personal—and not merely of the remainder in the particular portion given for life to Elizabeth. The testator expressly directs his debts to be paid out of some portion of his estate other than that devised to Elizabeth. Whether that portion was large or small does not affect the construction of the residuary clause, so long as it appears plain that the testator contemplated other subjects of the devise besides the remainder in the property given to Elizabeth for life. It is also worthy of observation that in regard to a legacy directed to be paid out of the proceeds of this very property, provision is expressly made for the contingency of the legatee dying before the life-tenant; and if it had been the design to make the same provision in relation to the donees of the general residue, it is singular similar unequivocal expressions were not used. But so far from this, the residuary clause is constructed without the slightest reference, in language or by implication, to the fact that one of its subjects was a remainder on a life estate. The terms used are such as would be appropriate in case there was no such remainder. From the circumstance that the residue given is general, and not solely the residue of particular property previously given for life, the case is relieved from any feature tending to establish an exception to the usual rule, that the interests under a will vest on the testator's death. Such property as was not

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EX PARTE, LINDSAY.

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previously given for life would undoubtedly vest immediately on the testator's death in all the persons named, then living; and it is impossible to give the same words of the same devise a different interpretation, because there are other residuary interests not coming into possession until the death of a life-tenant. The testator has not made this distinction, nor indicated such an intention. The clause in question must be left to its ordinary legal construction, without disturbance from the peculiar nature of some of the interests affected by it. I am of opinion that Mrs. Dominick took a vested interest in *all* the residuary estate of the testator, independent of any contingency, the survivorship being referable to the period of the testator's decease. Her assignee, therefore, is entitled, notwithstanding she died before Elizabeth, the life-tenant of a portion of the property.

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EX PARTE, LINDSAY.

*In the matter of proving the last will and testament of*  
**MARY LINDSAY, deceased.**

THE testatrix commenced her will in this way—"According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of H. & Co. Of this, I leave to A. L. & Co. &c." After making the will, she proceeded safely to St. Louis, and subsequently returned to New York, where she died. *Held* that the validity of the instrument must be tested by the proof of its original execution, and by its contents, without the aid of parol evidence as to the intention of the testatrix in respect to its subsequent ratification.

Wills may be conditional, that is, dependent for their testamentary operation upon a specified contingency. The condition must appear upon the face of the will, and go to the root of the entire instrument, in order to affect the question of probate.

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EX PARTE, LINDSAY.

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If the conditions are of partial application, the will is admitted to proof, and the effect of the conditions upon particular legacies, becomes a matter of construction.

If the words do not clearly express that the entire instrument is to take effect or to fail upon a particular event, the court is justified in a sentence of probate on the formal proof, so as to leave the determination of its conditional character for subsequent consideration. Held that the words "according to my present intention," &c., in the introductory part of the present will, may have been designed to express the occasion of making the instrument, rather than a clear condition on which its validity was to depend, and the will was accordingly admitted to proof.

**THE SURROGATE.** The instrument offered for probate, bears date September 1, 1851. It is proved to have been duly executed as a will. The paper runs in this way:—"According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of Mr. Harrison, bearing interest for me. Of this I leave to Mrs. Anne Lindsay, widow of my dear brother now deceased, one hundred and fifty dollars, for the benefit of herself and her children, share and share alike. The other hundred and fifty, I leave to the Associate Presbyterian Church, &c., for promoting the cause of Christ in said church."

It appears that the deceased proceeded safely to St. Louis, on the proposed journey mentioned in the will, and afterwards returned to New York, where she died in December last. Is the paper propounded for proof, an absolute or a conditional will, and must that point be determined on the probate? At common law there might be conditional wills of personalty, that is, wills the validity or operation of which was, by the terms of the instrument itself, made to depend upon a specified contingency. The condition must be one which goes to the root of the entire will, and not merely to certain provisions, in order to have the question raised on the probate. If the conditions

## EX PARTE, LINDSAY.

are of partial application, the will is admitted to proof, and the effect of the conditions upon the particular legacies becomes a matter of construction. If the conditions are general, and relate to the entire will, the vitality of the whole instrument is involved, and the question becomes material on the probate.

There is another question necessary to be determined in this class of cases, and that is, whether the words clearly express a contingency upon which the instrument is to take effect, or whether they may fairly be interpreted as indicating the cause or occasion of making the will; whether, in the language of Sir John Nicholl, "it is an absolute condition, or dependent on any particular motive operating at the time." "Albeit," says Swinburne, "the testator make his testament by reason of some great journey, yet it is not revoked by the return of the testator." In *Burton vs. Collingwood*, 4 *Hagg.*, 176, the will began in this way: "March 5, 1814. Morning, near one. All men are mortal, and no one knows how soon his life may be required of him. Lest I should die before the next sun, I make this, my last will and testament, in thankfulness to God that I have anything left to devise." This will was preserved by the testator for eighteen years, and was admitted to probate, on his decease; the court being of opinion that it was not contingent as to the disposition of the property. In *Forbes vs. Gordon*, 3 *Phill.*, 625, the court said, "The words, 'In case of my inability to make a regular codicil to my will, I desire the following to be taken as a codicil, &c.,' are not provisional or conditional terms, but mean no more than 'Till I make a regular will, so long I adhere to this paper.'" In *Bateman vs. Pennington*, 3 *Moore, P. C. C.*, 223, the instrument was written in ink, but dated and signed in pencil, with the addition, "In case of accident, I sign this my will." The testator lived more than three months after. The will was admitted to probate. The terms, in the case of *Strauss vs. Schmidt*, 3 *Phill.*, 209., were, "In case I should die on my travels, &c." The testator returned home, and having

## EX PARTE, LINDSAY.

subsequently recognised the paper in question, it was allowed probate, on the idea that a conditional will may be converted into an absolute one, by a subsequent act of ratification or recognition. Said the judge, "Courts are cautious how they construe conditions of this sort. I have looked whether it is an absolute condition, or dependent on any particular motive operating at the time. It does not say it is to take place only in the event of his dying.—If, on the return of the deceased, by subsequent acts he has recognised those papers, I should not hold his return to be such a defeasance as to invalidate the will. If he had returned and taken no notice of the paper, his silence would have put a construction on it—if, on the other hand, his conduct shows that he was mindful of it, the court is bound to carry his intentions into effect." In *The Goods of Ward*, 4 *Hagg.*, 179, the paper propounded was an unattested letter containing this expression: "I mention these matters thus particularly, to serve as a memorandum for you, in case it should be the Lord's will to call me hence by any fatal event in the voyage or journey before us." This instrument was rejected, the testator having returned from his journey and made a subsequent attested will. In the case of *Todd's Will*, 2 *Watts & Serg.*, 145, the will began in this way, "My wish, desire and intention now is, that if I should not return (which I will, no preventing Providence), what I own shall be divided as follows." It was held that the will was conditional, and the party having returned, it ceased to have any effect. In *Parsons vs. Lanoe*, 1 *Vesey, Sen.*, 190, the condition was, "If I die before my return from my journey to Ireland." The decedent did not die before his return. Lord Hardwicke held that the will was entirely contingent upon the event specified, saying, "I am very clear without help of an authority, that a will or codicil may be entirely depending on a contingency, so as to have no effect as an instrument of a will, unless that event happened—nor should it be proved in the ecclesiastical court." In *Sinclair vs. Hone*, 6 *Vesey*, 608,

## EX PARTE, LINDSAY.

the contingency expressed in a codicil, was, "In case I die before I join my beloved wife," &c. The testator joined his wife before his death, and though the codicil had been admitted to probate in the ecclesiastical court, it was held by the Master of the Rolls, to be contingent, and to be defeated by the failure of the condition. He said, "There is nothing in the objection upon the probate of this codicil granted by the ecclesiastical court. I do not say there may not be a case in which it would be the duty of that Court to refuse probate, where the objection was so plain, that there could be no doubt, as in the case of *Parsons vs. Lanoe*, where it was clear that he had returned. In such a case the Ecclesiastical Court might refuse probate, the paper being clearly not intended to have effect in the event that happened. But where there is a doubt, to say they may refuse probate, merely because in one possible event the instrument may be left inoperative, cannot be maintained." (*See Morrell vs. Dickey*, 1 *Johns. C. R.*, 153.)

It will be observed that all these cases occurred before the adoption of the statute prescribing the mode of executing wills of personal estate, and when the court might judge from extrinsic evidence as to the intention of the testator. In the case now before me it appears in proof that the person with whom the decedent deposited the will offered on her return from St. Louis, to give it up to her, saying that "she supposed the paper was of no use, to which the decedent replied she wished it to stand as it was, and desired her to keep it, for if she had to do it again she would make a similar will." At the period when parol evidence of republication could be given and no formal act was required, this evidence of subsequent ratification or recognition would have been sufficient. But under our statute, republication now requires the same formalities as are requisite to the original execution of a will. The validity of this instrument must, therefore, be tested by the proof of its original execution, and by its contents, without the aid of extrinsic evidence as to the intention of the testatrix. If

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EX PARTE, LINDSAY.

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the will be admitted to probate, it will still remain a matter of construction whether the bequests are made dependent upon a condition or contingency. If it be denied probate, that question cannot be brought before a Court of Construction. If, therefore, in a case of this kind there be room for reasonable doubt as to the contingent character of the instrument—if there are not clear and unquestionable terms of contingency, the Probate Judge is justified in a sentence of probate on the formal proof, so as to leave the determination of its conditional nature for subsequent construction and interpretation. In this instance, to say the least, there is room for reasonable doubt. The words "According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars in the hands of Mr. Harrison," may express rather the occasion of making the instrument, than a clear condition on which the disposition was to take effect. She does not say that she gives *only* in case anything should happen, but expresses a general desire to make "a correct disposal" of her property, naturally introducing the reason or motive operating. The term "should" in this connection, does not necessarily import condition or contingency as to the subject matter of the instrument, but may have been designed to express the idea that *lest* or *for fear* "anything should happen," &c., she proposed to make a will. It is used by way of introduction, and not in the clause of gift. The will is inartificially drawn; and where language is employed without exactness or precision, close and literal interpretation may very easily carry us wide of the intention. I am, therefore, of opinion that the will should be admitted to proof, and its construction be left for future consideration.

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NELSON vs. THE PUBLIC ADMINISTRATOR.

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## NELSON vs. THE PUBLIC ADMINISTRATOR.

*In the matter of proving the last Will and Testament of  
JAMES MATHESON, deceased.*

AFTER administration granted, four unattested wills, three others apparently duly executed, and several papers of revocation were discovered. The last of the executed wills was proved, and it was *held* that it was not revoked by any of the other instruments which were only subscribed by the testator, but not attested by subscribing witnesses. A revocation, to be valid, must be executed with all the formalities requisite for the due execution of a will. This will is not affected by any written evidence of an intention to revoke, no matter how clearly proved or frequently expressed.

FORSTER & THOMPSON, *for Executors.*

A. B. TAPPAN, *for Public Administrator.*

THE SURROGATE. Letters of administration were issued on the estate of the deceased to the Public Administrator. Subsequently, four unattested wills, three others apparently duly executed, and several papers of revocation, were discovered. The latest of the executed wills is dated February 3, 1840, and that is the instrument now offered for proof. Its execution is formally proved by the depositions of the subscribing witnesses; but it is urged that it has been revoked. Three of the alleged revocations are wills signed but not attested, and three are mere declarations of revocation, subscribed by the testator, but without the names of subscribing witnesses. They run in this way, "I, James Matheson, &c., do hereby abrogate and revoke all testaments, wills, or codicils I have, or might heretofore have made," &c. "I, James Matheson, who have made and wrote and signed the within my last will and testament, do hereby rescind and revoke this my last will and testament, and all or any other wills and testaments or codicils of wills, for-

merly or heretofore made by me," &c. "I hereby rescind and revoke these my last wills and testaments, or any other wills and testaments or codicils of wills formerly or heretofore made by me." The first of these was on a separate sheet of paper, the second on what appears to have been a wrapper, and the third on the back of a will executed in 1839. They are all posterior in date to the will propounded for proof. They express, as strongly as anything can, a determination to rescind every instrument of a testamentary character ever executed by the testator; and they express this repeatedly, showing a continued and earnest intention to revoke. They show that the testator supposed the mere writing and subscribing them was sufficient to constitute a present operative act of revocation, and that his will executed in 1840, was not conformable to his subsequent wishes. But notwithstanding this mistaken supposition, and this undeniable evidence of an intention to revoke all wills, the law must govern, though the rules adopted for wise and salutary purposes may seem hard in this particular case. The statute is just as rigid on the subject of written revocations as in regard to the execution of wills. A revocation in writing, to be valid, must be "executed with the same formalities with which the will itself was required by law to be executed." The testator might have revoked by burning, tearing, cancelling, obliterating or destroying; but he selected the mode of revocation by writing, and has failed in accomplishing his object from want of the necessary formalities. What would be the effect of a written declaration of revocation upon an executed will—whether it could be regarded as a present attempt at *cancellation*—it is not necessary to consider; for the will upon which one of these revocations was written is anterior in date to the one propounded. I see no room, therefore, for any argument on the subject: the terms of the statute are clear and unequivocal; the testator has adopted a manner of revocation in which he has failed to comply with the law, and these informal acts have no legal validity. The will must, therefore, be decreed to have been duly proved.

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BERNES vs. WEISSER.

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## BERNES vs. WEISSER.

*In the matter of the Estate of WILLIAM WEISSER, deceased.*

A judgment against a surety on a stipulation in admiralty, recovered after the death of the stipulator, is not entitled to priority of payment out of his assets. The provision of the statute authorising judgments, in certain cases, to be entered against the deceased after his death, and declaring that such judgments shall not bind the real estate, but be considered as debts payable in the usual course of administration, relates to judgments in our own courts.

Whether judgments recovered in the life-time of the deceased, in the United States Courts of this District, are entitled, under the statute, to priority of payment—*quæra*.

ALANSON NASH, *for Petitioner.*

M. PORTER, *for Administrator.*

THE SURROGATE. The assets of the intestate being insufficient for the payment of all his debts in full, Carl Bernes, one of the creditors, presents a demand for which he claims priority. The intestate, in the month of January, 1849, signed a stipulation in admiralty in a cause wherein Bernes was libellant. On the sixth of the succeeding June, a decretal order of reference was made to ascertain and compute the amount due the libellant; on the 29th of December the Commissioner reported, and on the 2d of January, 1850, a final decree was entered, and judgment was also recovered against the stipulators. By the terms of the act of Congress of March 3, 1847, "judgment both against the principal and sureties may be recovered at the time of rendering the decree in the original cause;" and the practice is to enter this judgment without going through the form of a suit, and to enforce the stipulation by summary process of execution. (1 *Conkling's Admiralty*, 412, 460; 2 *Id.*, 775).

## BERNES vs. WEISSER.

Weisser, the intestate, died August 28, 1849, and I suppose the judgment against him in the succeeding January was unauthorized. At the time of his death he was only liable on the stipulation, and was not a judgment debtor. If proceedings had thereafter been taken against his administrator, they could have resulted only in a judgment against him, and not against Weisser.

The stipulation in admiralty is an obligation that is not dissolved by death, and extends in terms to heirs, executors and administrators. In England, the Court of Admiralty is not a Court of Record, and for that reason has at common law been held incompetent to take recognizances constituting debts of record, entitled to priority of payment and binding the lands of the cognitor. Such an effect of the stipulation has not been claimed by the Admiralty Courts in this country. But even treating it as a recognizance, it is not a record until it is enrolled, and at common law a recognizance has no preference over specialty debts until enrollment (*Glynn vs. Thorpe*, 1 *Barn & Ald.* 153. *Bothomly vs. Fairfax*. 1 *P. Wms.*, 334). At the time of Weisser's death, therefore, there was no debt of record against him. The stipulation was nothing more than a conditional obligation to pay, and although judgment could be entered on it, without service of process, immediately on the final decree against the principal, yet that was not in fact done during the intestate's lifetime. The stipulation certainly did not constitute a judgment, in any sense, and our statute gives priority under the third class of preferences, only "to judgments docketed and decrees enrolled against the deceased."

There is a provision of the statute, authorizing judgment in certain cases to be entered against the deceased after his death, and then it is directed that when a record of judgment shall be filed and docketed within a year after the death of the party defendant, the judgment shall not bind the real estate, "but shall be considered as a debt to be paid in the usual course of administration." (2 *R. S.*, p.

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BROWN vs. LYNCH.

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359, § 8.) If the effect of this section be, as supposed (9 *Wendell*, 455), to give the judgment recovered after death priority of payment over simple contract debts, yet the provision relates only to judgments in our own courts.

I have had occasion to determine that judgments recovered in the courts of other States, have no priority of payment over simple contract debts. The judgments of the United States courts, are not to be considered as foreign judgments, and yet, if recovered in this district, do they come within the provision of the statute giving judgments a preference? (6 *Paige*, 457.) It is not necessary now, to consider that question, as the judgment recovered on the stipulation signed by the intestate, was recovered after his death, and not being in a state court, and therefore not such a judgment as our statute contemplates when it authorises judgments to be docketed after the death of the party, has no statutory authority for its payment, except as an ordinary debt. The claimant must, therefore, be denied any preference.

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BROWN vs. LYNCH.

*In the matter of the guardianship of* THOMAS R. LYNCH.

THE Surrogate has jurisdiction to grant letters of guardianship only in case of minors residing in the county.

Where the parents resided and were married in the State of Connecticut, and the child was born there, the father having previously removed to New York, where the mother, after the birth of her infant, joined him—*Held*, that the original domicile of the minor was that of his parents at the time of his birth.

On the death of the father, the establishment in New York having been broken up, and the mother, with her child, removed to the residence of her parent in Connecticut—*Held*, that the domicile of the minor was changed to that State.

## BROWN VS. LYNCH.

The mother having married again, and left Hartford to reside at New York with her husband—*Held*, that although by marriage she adopted the domicile of her husband, the domicile of the child was not thereby changed.

The mother, after the father's death, may change the domicile of her children, provided it be without fraudulent views to the succession of the estate. The domicile of the children does not necessarily follow that of the surviving mother; for, although changing her own, she may, from wise motives, refuse to alter that of the child. The presumption, however, is, that their domicile follows hers. But this rule does not obtain on the second marriage of the mother. By that act she acquires the domicile of her husband, and loses all power to control that of her children.

Although the *forum* of the minor may follow that of the surviving mother, yet on her decease the forum of the minor is restored to the place of his domicile.

WM. C. FREEMAN, *for Petitioner.*  
CHARLES BUTLER, *for Guardian.*

**THE SURROGATE.** This is an application to revoke the letters of guardianship granted to the aunt of Thomas R. Lynch, October 14, 1852, on the ground that the minor was not, at the time, a resident of this county. There is no dispute in regard to facts; and the only question is as to the conclusions of law.

The child was born at Hartford, Connecticut, at the house of his maternal grandmother, Mrs. Raphael. His parents resided in that State at the time of their marriage. At the time of his birth, his father had removed to New York, where he was afterwards joined by his wife. They continued to reside in this city until Mr. Lynch's death, in June, 1846, when the establishment here was broken up, and Mrs. Lynch and her son returned to the house of her mother, at Hartford. There they continued to live until Mrs. Lynch's marriage with Francis Brown. Mrs. Raphael says, "at the time of the marriage, it was understood between Mr. Brown, his wife and myself that the boy should make his home with me. He remained with me. His mother moved directly to New York, where she remained till she died," in February last. On the 29th of January,

## BROWN vs. LYNCH.

1850, Mr. Brown was appointed guardian of the minor by the Judge of the Court of Probate for the district of Hartford. The boy, for several years, has been at school at Hartford, and at Wilton, Connecticut, and in vacation returned to his grandmother's house, where he boarded until his return to school. She had the entire charge of him in every respect, except the payment of his expenses. During the lifetime of his mother, he spent some portion of his vacations with her in New York; but it does not appear that he has been in this city since his mother's decease, except for a week in the beginning of October last. He was brought here by his teacher, who is in the habit of bringing his scholars from Wilton, and dismissing them in New York.

There has been much and learned discussion in relation to the residence of minors, especially among the civilians. Authorities of great weight and distinction have differed materially as to the manner in which a change of the minor's domicile may be effected, particularly as to the power of the guardian, or of the mother after the decease of the father. (*Phillimore on Domicil*, § 57.) I have no doubt, however, that the weight of modern authority is in favor of the proposition that the surviving mother may change the domicile of her minor children, provided it be without fraudulent views to the succession of their estate. This power did not exist in the Roman law, which may account for the resistance it has met. It is supported by the authority of Bynkershoek, Voet, and Pothier, Sir Wm. Grant, Justice Story and Chancellor Kent. (*Pottinger vs. Wightman*, 3 *Merivale*, 67; 2 *Kent's Com.*, pp. 227, 480; *Burge's Com.*, 1, p. 39.) To state, however, that the residence of the mother is necessarily the residence of the child is too broad a position; for the power of effecting the change may very well exist without being exercised, and the mother's residence may be altered while at the same time she refuses to alter that of the child. Where, however, nothing more appears than the removal in fact of the

## BROWN vs. LYNCH.

mother and her children from one abode to another, the presumption would be that the domicil of the child has followed that of the parent.

Applying these principles to the present case, it appears that the residence of the minor, Thomas R. Lynch, which, at the decease of his father, was in the city of New York, became changed to the State of Connecticut by the removal of his mother. The family establishment in this city was broken up, and she returned to the residence of her mother, the place of the boy's nativity, and the State where she and her husband were domiciled at the time of their marriage. There certainly could have been no doubt then, and during the years that elapsed before her second marriage, that the child resided in Connecticut. That the mother should return to her home, after the only tie was dissolved which had bound her to a residence in New York, was the most natural thing in the world. All her interests and attachments were manifestly centered there; and after her removal, that must undoubtedly be considered as the place of her permanent abode. The domicil she had acquired in New York, by the occasion of the removal of her husband here after marriage, ceased, and her original domicil was restored. The case is obviously stronger than a change of domicil to some entirely new place of abode.

But she marries again, and leaves Hartford to reside at New York with her husband. It is a universal maxim that the wife takes the domicil of the husband. (*Digest*, 50, 1, 37; *Code*, 12, 1, 13, 10, 40, 9; *Warrender vs. Warrender*, 9; *Bligh*, 89.) But was the residence of the minor changed by that act? In the first place, if it were true that the domicil of the minor follows that of the surviving mother, *on her second marriage*, it seems to me plain that it is not a matter of legal necessity. The mother is not *compelled* to change the residence of her child. She may, from wise and prudential motives respecting the comfort, happiness, or education of her offspring, determine not to change his residence. And if such determination be evinced and

## BROWN vs. LYNCH.

acted upon, the inference that might be drawn, that the domicile of the child followed that of the parent, is rebutted and destroyed. The ordinary presumption of law (if it existed in such a case), would give way before express and positive acts subversive of all inferences and presumptions. If, while the mother continues in her widowhood, it is within the scope of the parental authority, when she changes her own domicile, not to change that of her child, the moral reasons for such a power would be much stronger in the event of a second marriage, supposing she still retained any capacity to effect a change of her own domicile. But she does not. By the act of marriage she takes the domicile of the husband; and to hold that the domicile of the child is drawn after hers, would be to establish an arbitrary train of sequences unsupported by reason. The mother subjects herself to the control of another husband, and adopts his home; and when she ceases to occupy an independent position as the head of the family, she cannot delegate to another a personal trust residing in her for the welfare of her children. I have no hesitation in saying that the proposition is unsound, which maintains as a necessary legal consequence that the domicile of the child follows that of the step-father. Children, says Pothier, have the domicile their mother establishes, without fraud, so long as remaining in widowhood she preserves the quality of chief of the family; but when she remarries, and thus acquires the domicile of her second husband, into whose family she passes, the domicile of the second husband does not become that of the children, who do not pass into the family of their step-father, but preserve their domicile where their mother had hers before she remarried, as they would have preserved it had she died. (*Pothier, Introd. aux Coutumes*, p. 9, § 19; *See Inhabitants of Freetown vs. Inhabitants of Taunton*, 16 *Mass. R.*, 52; *School Directors vs. James, 2 Watts and Serg.*, 568.) It may be said that these principles apply only to the domicile so far as relates to the question of succession, and that the *forum* of the minor is that of the surviving

## BROWN vs. LYNCH.

mother or guardian. Even if that were so, I think that on the decease of the mother it was restored to the place of the minor's domicil. But, however that may be, the jurisdiction of the Surrogate expressly depends, by the terms of the statute, on the *residence* of the minor. Here, in the lifetime of the mother, the court of the place where the minor had his domicil appointed the step-father guardian; and neither the mother or guardian ever changed the residence of the child, in fact, or applied to the *forum* of the parents for judicial action. The actual and the legal domicil of the minor, and the *forum* appealed to, all unite to fix the place of residence in Connecticut, and not in this State. The mother, on her second marriage, came to an understanding with her husband, that the boy should make his home with the grandmother, in whose house he had been living; and the subsequent conduct of the parties was invariably in harmony with this understanding. The arrangement was in consonance with the law, and the rights of the minor, and was never disturbed. I am therefore of opinion that, on the marriage of his mother, the child's residence was not, by legal consequence, changed from Connecticut to New York, because his mother acquired the domicil of her second husband; and that if such change would have been effected in the absence of a contrary arrangement, it would have been prevented by the acts and conduct of all the parties, and the continued residence in fact, of the minor, in the State of Connecticut. The letters of guardianship issued by me must therefore be revoked. The question presented being somewhat novel, costs are not allowed to either party.

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MONTGOMERY vs. DOWNING.

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MONTGOMERY vs. DUNNING.

*In the matter of the estate of WORTHY W. MONTGOMERY,  
deceased.*

THE rule that the inventory cannot be impeached, relates only to proceedings in relation to the inventory itself. It may be shown on the accounting of the administrator or executor, that the assets were not correctly stated in the inventory.

Where partnership property has come into the hands of an administrator, he is no further accountable than for the share of the deceased in the partnership assets, after payment of all the liabilities, and a full settlement of all the partnership accounts.

PORTER MONTGOMERY, *for next of kin.*  
G. P. ANDROUS, *for administrator.*

THE SURROGATE. On the accounting of the surviving administrator, objection was made that the administrator had surrendered to one Fredericks, as assets of the firm of Montgomery & Fredericks, certain gold dust which, the next of kin allege, was the individual property of the deceased.

I think the proof in the case sufficient to establish the partnership between the intestate and Fredericks. I have come to that conclusion independently of the testimony of Fredericks. It appears also, that the deceased stated on his arrival here, that he had come to New York for the purpose of purchasing goods for the business, and had brought on some gold dust. The partnership existence being determined, the question remains as to the ownership of the gold. That fairly comes before the court, and is a proper subject for consideration. It is an error to suppose the inventory conclusive as to the extent of the assets. It is true an inventory cannot be impeached, but that rule relates only to proceedings in relation to the inventory itself. An account may be falsified, and upon the accounting of the administrator or

## MONTGOMERY vs. DUNNING.

executor, the parties in interest are entirely at liberty to prove that he has not accounted for all that he has received or which he ought to have received. On such a charge, his inventory will not help him, for that is only his own sworn statement of the assets. Of course, the presumption of law is in favor of the correctness of the inventory, but this presumption goes no further than to make it *prima facie* evidence of the assets. It may be rebutted, and it is entirely competent for next of kin, legatees or creditors, to show that the account is false or erroneous, in the omission of assets, either received or which ought to have been received. They may show that the administrator or executor has intentionally failed to account for certain portions of the estate, or that he has made himself liable by failing to collect, or improperly surrendering, the property of the intestate. The rule that an inventory cannot be impeached, has not the slightest applicability to an account. The latter is a separate proceeding which has nothing to do with the inventory. Even in the ecclesiastical courts, where an inventory and account frequently come in together, legatees and next of kin may disprove or object against the account. (4 *Burn, Ecc. L.*, 488; *Hinton vs. Parker*, 8 *Mod.*, 168.)

If the gold dust in the possession of the intestate, was partnership property, then the administrator is no further responsible in that respect, than for the interest of the deceased in the surplus of the partnership assets, after the settlement of the partnership accounts. Mr. Fredericks, the surviving partner, stated the accounts, and paid over to the administrator the amount found due to the deceased, according to that statement. Dunning cannot be made liable for more than he received, unless error or fraud be shown. I am satisfied that he acted in good faith, and there are no facts in proof to show that he ought to have engaged in litigation with the surviving partner, or that he could reasonably have hoped to have been successful if he had instituted a lawsuit. Fredericks positively avers that

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MONTGOMERY vs. DUNNING.

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the property in the possession of the deceased, for the most part, belonged to the firm, and that the accounts as settled, were strictly correct. He met the intestate's next of kin, at Onondaga, made the same statements to them, and having previously threatened legal proceedings against the administrators, agreed that he would not proceed within a certain period. He says, "They wished I would wait ten days before going on with suit against Dunning, and then George Montgomery would come down or write to me what their conclusion was. I supposed my lawyer had commenced suit." At the end of that time, Montgomery came to New York, and the settlement was made. These facts are not denied, nor has an attempt been made to disprove them. George Montgomery was himself one of the next of kin, and interested in making the most advantageous settlement with Fredericks. Dunning was sick at the time, and the arrangement was made by Montgomery, after the interview between Fredericks and the family, at Onondaga. All this seems fair, nor can I discover any indications of fraud or careless dealing. The parties interested were fully apprised of the claim of Fredericks, they heard his explanations, understood he would proceed at law, unless the matter was adjusted within a specified period, and yet took no steps to admonish or warn the administrators against yielding to the claim. The reasonable inference is, that they assented to the arrangement; but whether that was so in fact or not, they knew of the position Fredericks assumed, and if they desired to contest it, they were bound to give notice, and not let the administrators act upon the very natural supposition that their proposed course met with the sanction of the parties.

But apart from this, I do not see that the administrators have lost anything to the estate. There can be no doubt of the partnership, and the journey of the intestate to New York, on the partnership business. Looking at the object of the journey, and other circumstances, a presumption arises that the property belonged to the firm; and then,

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WOODRUFF vs. COX.

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Fredericks proves that positively. The original books and accounts were all shown to the administrator, Montgomery. Being partnership books, the presumption is in favor of their accuracy; and again, Fredericks positively affirms it. The effort to impeach the acts of the administrators in this respect, must, therefore, fail. This disposes of the most important objection to the accounts. The others will be determined on the settlement of the decree.

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## WOODRUFF vs. COX.

*In the matter of the estate of ABRAHAM H. VAN WYCK,  
deceased.*

On an application for the payment of a debt, where the claim has been assigned and the proof depends chiefly on the evidence of the assignor, *held* that, inasmuch as in an action at law the assignor would not be a competent witness for the claimant, it was proper for the Surrogate to dismiss the petition, leaving the alleged creditor to his action.

The code of procedure does not apply to proceedings in surrogates' courts, further than has been expressly provided therein. In the first part, surrogates' courts are enumerated in the 9th class of courts of justice; and the second part relates only to civil actions. The 471st section declares that the second part shall not affect proceedings upon mandamus or prohibition, nor appeals from surrogates' courts, nor any special statutory remedy not heretofore obtained by action. Proceedings in surrogates' courts are not actions, but are special statutory proceedings.

S. E. SWAIN, *for claimant.*

W. SELLIMAN, *for executrix.*

**THE SURREGATE.** This is an application on the part of an alleged creditor, for the payment of a debt. The claim was controverted, and in order to sustain it, the petitioner depended chiefly upon the evidence of the assignor of the

demand, the party with whom, it is insisted, the testator contracted the debt. This evidence was objected to, on the ground that the assignor was an incompetent witness under section 399 of the code, which declares that "When an assignor of a thing in action or contract, is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him, against an assignee or an *executor or administrator*, unless the other party to such contract or thing in action whom the defendant or plaintiff represents, is *living*, and his testimony can be procured for such examination." I do not think this objection well taken, for the reason that the code of procedure does not apply to proceedings in surrogates' courts, any further than has been expressly mentioned. Nothing has been enacted in the first part of the code relative to surrogates' courts, except simply the enumeration of them in the 9th class of the courts of justice of this State. The second part of the code relates only to civil actions; and by section 471, it is expressly provided that the second part of the code shall not "affect proceedings upon mandamus or prohibition, nor appeals from surrogates' courts, nor any special statutory remedy not heretofore obtained by action." Proceedings before surrogates were not actions previous to the code, but special statutory proceedings, and they are, therefore, expressly exempted from the operation of the code. While I am clear on this point, I am satisfied, however, that the present application ought to be dismissed, in the exercise of the discretion reposed in me by the statute authorising the surrogate to direct the payment of a debt. There is no hardship in turning the petitioner over to his action at law. His claim is disputed, and forms a very proper subject for the usual forum of a civil action. By coming before me, he escapes the application of a rule of evidence

designed to meet a class of cases precisely like this—a rule which is the general law in all the usual channels of justice, which is most wise and salutary in its nature, and is especially applicable to proceedings against the estates of deceased persons. The original scope of the code embraced all the tribunals of the State, but the execution of the plan has not yet reached the course of procedure in the surrogate's court. But the principle of the provision against permitting the assignor of a chose in action to be a witness in establishing the demand, when the other party to the contract is dead, has received the sanction of the legislature. While, therefore, I cannot apply this provision to controversies before me, still I am so far bound to respect the policy and principles of the code, as to send the suitor to the courts of justice where claims like his are ordinarily tried, and where he will have the general law of the land applied to his case. I think the executor may justly claim this, for the reason that he cannot have that law applied here. Without passing upon the merits of the demand, therefore, I must dismiss the application, and without costs to either party.

## PEEBLES vs. CASE.

## PEEBLES vs. CASE.

*In the matter of proving the last will and testament of  
FRANCIS GRAHAM, deceased.*

Two wills bearing the *same* date, purporting to be attested by the *same* witnesses, and *both* in the handwriting of the decedent—one recognised and proved by both witnesses, who denied any knowledge of the other—the latter was admitted to probate as the *last* will, notwithstanding the denial of the witnesses, upon evidence of handwriting, identification of the instrument as recognised by the decedent, *memoranda* in the handwriting of the deceased, and other circumstantial evidence.

If the subscribing witnesses have lost all recollection of the execution, the Court, if satisfied from other evidence that they did in fact witness the will, may admit it to probate; the performance of the usual formalities being inferred from the recitals of the *testatum* clause.

When the subscribing witnesses corruptly deny the execution, and, *a fortiori*, when they are mistaken, the proof of the will may be supplied from other sources.

The proof of a will abides by the same rules of evidence as prevail in all other judicial investigations.

The question for the Court is, the *factum* of the instrument, and that may be proved in the very teeth of the subscribing witnesses.

As to the effect, nature and character of their testimony, the subscribing witnesses stand on the same ground as other witnesses, on the subject of contradiction; and if untruth, mistake, or want of recollection be alleged, it is not only competent to prove it, but, on its being proven, and the Judge being satisfied of the validity of the will, decree of probate should follow.

The sections of the statute providing that, where the witnesses are dead, insane, out of the State, or incompetent to testify, proof of their signatures may be taken, are only directory, and do not forbid a resort to that class of testimony in other cases, when necessary for the ascertainment of truth.

Having attained jurisdiction of the subject matter, the Surrogate, where the course of procedure is not prescribed by statute, must dispose of it according to the established rules of evidence.

ALDEN J. SPOONER and C. G. PEEBLES, *Executors in person.*  
JAS. G. M'ADAM, *for Contestants.*

## PEEBLES vs. CASE.

**THE SURROGATE.** The instrument propounded for probate in this case, by the executor, C. Glen Peebles, bears date February 15th, 1850, and purports to be attested by William B. Parsons, and David F. Smith. On the examination of these witnesses, George F. Case produced another will of the same date, which the witnesses identified as having been attested by them, at the same time denying any knowledge of the execution of the first-mentioned will. It is important to examine, with critical attention, the character of this denial, in order to see whether it is founded upon a clear and distinct recollection of the circumstances, or is the result of an argument in the minds of the witnesses. If the latter, then they may be mistaken in a conclusion derived from insufficient and erroneous reasoning. Mr. Parsons says, in relation to the execution of the will propounded by Mr. Peebles, "The signature of my name, as a subscribing witness thereto, *looks very much like my writing. I cannot say that it is. I would not like to say it is not, and I cannot say that it is mine.*" "I have not the slightest recollection of signing it." The witness then proceeds to state that he did attest a will of the deceased; the paper produced by Mr. Case,—and he gives his reasons for fixing upon that instrument. He says, 1. That at the time of execution, he noticed the words "Sparhawk Parsons," "eighth," on the last line of the first page of the will. 2. When Smith signed his name "David F.," he asked him why he signed so, he being called "Fred;" to which the other replied that was his name, "David Frederick Smith." 3. That when the testator showed his signature, he recollects observing a peculiar scratch in the flourish under his name. Mr. Parsons adds, "I have no recollection of signing any other paper than Exhibit No. 1. (the will produced by Mr Case) as a will, for him, at any other time. It is possible I may have signed other papers for Mr. Graham, but I have no recollection of signing any that he presented to me on that day, or at any other time, as a will, except Exhibit No. 1. I am quite sure he did

## PEEBLES vs. CASE.

not exhibit his signature to me, to a paper which he called his last will and testament, at any time, except Exhibit No. 1. I have no recollection of signing any other papers than Exhibit No. 1, at any time, but it is possible I may have done so; but, if I did, I did not know what they were, at the time. Looking at my signature to the will propounded (by Mr Peebles) alone, *I don't see any reason to doubt its genuineness.* It is very possible it may be my signature, and that I have forgotten the occasion of putting it there, though I am quite sure it was not presented to me by Mr. Graham as his last will and testament." And again, "I cannot answer distinctly whether the signature of my name to said will was or was not written by me. I think I am acquainted with my own handwriting. From my knowledge of my own handwriting, I say, as I said before, it is very like my handwriting and possibly may be mine, but, not having any recollection of signing that paper, I cannot say that it is mine. I have no recollection of ever signing but one paper for Dr. Graham, but I may have signed a dozen. I can generally recognise my handwriting, independent of its association with any particular paper. I think I can. The only difference between the signatures to the two wills, that I observe, is that the signature to the will offered for proof (by Mr Peebles) seems stiffer than the other. The general character of the two signatures is not precisely the same; but if I did not write the signature to the will offered for probate (by Mr. Peebles), it is a very good imitation." "I don't think there was more than one paper signed when Exhibit No. 1 was signed, and I am sure there was but one paper signed as a will, in my presence, by Mr. Graham at any time."

Mr. Smith, the other witness, says "The signature of my name, to the paper propounded for proof in this matter by Mr. Peebles, *is not my signature,—is not my handwriting.*" "I never saw but two wills in my life, and these are the two. I recollect, distinctly, signing Exhibit No. 1. The reason why I know I signed Exhibit No. 1 is, because

## PEEBLES vs. CASE.

it is *the way I always write my name* ; and Mr. Parsons, at the time I signed No. 1, as a witness, directed my attention to his father's name, 'Sparhawk Parsons,' 'one eighth' on the last line of the first page, which was turned down. "I never signed any other paper as a witness for Mr. Graham. I never sign my name as D. Frederick Smith. I never have done so that I recollect. If I have, it was years ago,—so long ago, that I could not recollect. I am positive I never witnessed but one instrument for Dr. Graham. I am positive the words 'Sparhawk Parsons,' 'one eighth' were on the last line of the first page of the paper I signed." On being recalled, he further testified : "*I don't think anything was said as to putting our place of residence.*" "I think I have written to Dr. Graham." "I should say I signed my name to those letters, David F. Smith, or D. F. Smith. Perhaps it might have been Fred. The letter shown to me is mine." It "is signed Frederick Smith. That is not my usual way of signing. I have frequently signed bills and receipts for Mr. Dunlap. I don't recall putting the D. when I put Frederick in my signature. My mode of signing has been various, but when it is out of my usual way I recollect it." "The signature to the will propounded, is not mine. I did not write the words added to the signature, 'Exchange Hotel, 133, Fulton St., New York.' I positively did not write it. I never signed my name in that way in my life. If I had done so once, I would have known it. *The writing has a resemblance to mine, is a good imitation, but it is not mine.* They are something like. There is a difference, almost in every letter, that I can see ; but I don't think that I can explain it. There is as much difference between the writing in the several exhibits, Nos. 2, 3, 4, 5, 6, and 7, as between the signatures to the will propounded and Exhibit No. 1 ; but, in each case, I can identify my handwriting, except in the signature to the will propounded for proof. I should say the signature to the latter is not so stiff as that to Exhibit No. 1. I think the general characteristics in both are the same."

## PEEBLES vs. CASE.

"The body of both instruments, the will propounded, and Exhibit No. 1, including the attestation clause, are in Mr. Graham's writing; but I don't think both signatures are. I should not say the signature to the will offered for proof was his. I should think 'F. Graham,' on the paper now shown me (No. 8), is in his writing. I should think the whole paper is his. I should not say No. 9 was his. I should say No. 10 was his, and also Nos. 11 and 12. I don't know that I ever saw Mr. Peebles write. I should think that the words Francis Graham, in the paper now shown me, marked No. 13, looked like Mr. Graham's signature." Finally, the witness, having been called a third time, was asked whether he wrote the signature of his name to the will offered for proof by Mr. Peebles, and he answered: "*No, I did not; I never wrote my name in that way.*"

If these witnesses disprove the execution of the will propounded by Mr. Peebles, it is a forgery, and one, too, of a most remarkable character—a forgery of the names of witnesses to an instrument in every other respect confessedly genuine. For there is no manner of doubt that the entire body of both the wills in question, together with the attestation clause and the testator's signature, are in the writing of the deceased Francis Graham. To suppose that the testator put the names of Parsons and Smith there, is to suppose a wrong and motiveless act, by a party interested in having a genuine instrument. The paper bears marks of having been written after exhibit No. 1, and if Graham attempted to imitate the signatures of the witnesses to the first paper, he would not have varied the signature of Smith from "David F." to "D. Frederick." If we pass to the other supposition, that the signatures of the witnesses' names were written by some other person than Graham, then the fact urged by Smith, that he never wrote his name in that way, is strongly against the idea that any one would forge his name in that way. And, besides all, on the hypothesis of a forgery, there is the extraordinary

## PEEBLES vs. CASE.

coincidence, that the names selected for that purpose are those of the two persons who witnessed the other will. To attempt the establishment of a will by counterfeiting the names of witnesses who are living, without attempting to secure their complicity, is certainly a singular mode of committing a great crime.

It is clearly proved that, about the 15th of February, 1850, the decedent executed his last will and testament, and yet two wills are produced, each bearing that same date, appointing the same executors, each written by the decedent, and each purporting to be subscribed by the same witnesses. It is certain that a will was executed. If there was only one will executed, which is the paper; or does not the solution of the whole difficulty consist in there having been two wills executed on the same day? May not both wills be genuine? The instrument propounded by Mr. Peebles is more ample in form than the other, and, without doubt, was written after it.— In exhibit No. 1, the testator says, "I give, &c., unto the counsel whom I have this day retained and employed (by my sincere friend, C. Glen Peebles, Esq.), &c. &c." The will offered for proof by Mr. Peebles, runs thus, "I give, &c., unto Alden J. Spooner, Esq., of the city of Brooklyn, an attorney and counsellor whom I have this day retained and employed as my counsel (through my friend C. Glen Peebles, Esq., of the city of New York), &c., &c." Besides being less full and formal, in several of its details, than the will produced by Peebles, the will exhibit No. 1, contains an alteration of the interest originally bequeathed to Sparhawk Parsons, from "one-eighth" to "one quarter part." By each of these instruments, one-eighth of the estate is given to his counsel, and the remaining seven-eighths are distributed in eighth parts. Supposing the alteration from "one-eighth" to "one quarter" bequeathed to Sparhawk Parsons, by exhibit No. 1, to have existed at the time of execution, then the residue was all disposed of, but if the alteration was not made at the time of execution, then one-eighth of the residue was not bequeathed. The decedent

## PEEBLES vs. CASE.

was a copyist, particular in preparing papers, and of such accurate habits in this respect, as not to be likely to issue a formal instrument, containing an important interlineation un-noted. It is probable, therefore, that the interlineation in question was made on the discovery, after the paper was executed, that an eighth of the residue had been omitted. (*Burgoyne vs. Showler*, 1 *Robertson*, p. 5; *Lushington vs. Onslow*, 12 *Jurist*, 465.) This mistake, and the omission of Mr. Spooner's name in the first clause of exhibit No. 1, giving a bequest to "counsel" without naming him, would naturally lead to a revision of the will. For these reasons, if both the wills are genuine, I am satisfied that exhibit No. 1 was first written and executed, and that the will produced by Mr. Peebles is the *last* will.

As a circumstance that may bear slightly upon the due execution of both wills, I may mention that Smith says the transaction occurred near the middle of the afternoon, at 3 or 4 o'clock, while Parsons says it transpired near the middle of the day. Where the testimony of a witness is confessedly affected by his reasoning, and is not given as a matter of pure recollection, it is useful to test the evidence by the statements or conduct of the witness at a time when the facts on which he reasoned were different. After the death of Mr. Graham, it appears that Mr. Peebles applied to the proprietor of Dunlap's hotel, for the delivery of some papers contained in the desk of the deceased. At that time the will produced by Mr. Case had not yet been found, and the will in the possession of Mr. Peebles was the only one supposed to be existing. Mr. Dunlap then requested to see the will. Peebles exhibited it to him, and he called Mr. Smith and asked him "if that was his signature, to the will Peebles had." Mr. Roberts, one of the witnesses, says, "Smith replied, I think, in the affirmative, and, at any rate, the desk was opened and the papers delivered up. I don't remember the precise words, but inferred more from the facts that followed, that the answer of Smith was satisfactory to Dunlap. I am quite sure he did not deny the signature." Mr.

## PEEBLES vs. CASE.

Smith admits that a will was exhibited to him at Dunlap's hotel, by Peebles, who asked him if the signature of his name thereto was in his handwriting. He says, "I cannot say that the will propounded is the same paper, and I do not recollect what I said to him. I might have said 'Yes,' knowing that I signed a will for Mr. Graham. I did not read the paper he showed me. I have no recollection of telling Mr. Dunlap, that I had seen the will and it was all right, and that upon that representation Mr. Dunlap delivered the papers of the deceased to Mr. Peebles as executor." Again he says, "He handed me a paper, and I looked at it—I took it one side and read some of it, saw it was a will in fact, and told Mr. Dunlap it was a will, and that he had a right to the other papers." "Mr. Dunlap was then behind the bar. I recollect his coming there with a will but once. I knew Mr. Graham's writing, and I saw the signature to the paper. I was not particular to look at it; I noticed only its general appearance. I cast my eye over the whole paper; I think I did not say, 'Yes, that's my signature;' I would not say positively that I did not say so, but I don't think I did, because, if I had seen the signature, I should have known in an instant." Again, on being re-called, Mr. Smith, on being asked whether he saw his own name on the will shown him by Mr. Peebles, answered, "Well, I think I did." "I did not examine it close enough to be certain whether it was my handwriting or not." The question was then put to him: "Did you say it was?" He answered, "Not to my knowledge."—Question: "What did you say when the will was exhibited to you?" Answer: "I think I told Mr. Dunlap it was all right." Question: "Did you suspect it was not the will you had witnessed?" Answer: "I did not."

There is some confusion as to the time this will was exhibited. Mr. Roberts thinks a printed notice of the probate was shown at the same interview. But Mr. Smith states that he did not see the printed notice when the will was shown, and Mr. Parker says that, when the desk was opened, he

## PEEBLES vs. CASE.

saw the printed notice, but did not see the will. The will and printed notice of probate could not have both been exhibited at the same interview, for, on the citation for probate being issued, the will was deposited in this office. It is argued, therefore, that the will shown Smith was not the one now propounded ; but Mr. Parker mentions a fact which I think explains the transaction. He says he went to Dunlap's hotel, at the request of Mr. Case, who stated that the desk was to be opened, that "there was an *appointment* fixed for that time, for Mr. Peebles to come there and open the desk." "It strikes me," he adds, "that Mr. Case said he had seen the will under which Mr. Peebles claimed ; that he had been at the surrogate's office and seen it." This makes it probable that the will was first exhibited, and then an *appointment* made for a future meeting, at which time, the will having been deposited in this office, the printed notice was produced. I do not, however, esteem that question of much importance ; for, whichever way it might be, one thing is certain, viz., that the will shown Mr. Smith was not the one which he now says is the only one he ever signed, for that *was not found by Mr. Case until after the desk was opened*. The material fact is, that Mr. Smith, before the will offered by Mr. Case was discovered, permitted some other instrument, submitted for his inspection, to pass as genuine, and which, of course, he believed to be genuine. He first says, he does not think he saw the signature of his name, but subsequently thinks that he did, and although he did not examine it close enough to be certain whether it was his writing, admits that he told Mr. Dunlap it was all right, and did not suspect it was not the will he had witnessed. If, therefore, he never signed but one will, he has already been mistaken once, as to the identity of the instrument he did sign.—Again, he stated in his testimony, as one reason for knowing that he signed exhibit No. 1, that it was the way he *always* wrote his name ; and yet it was abundantly established that he had frequently written his name in another

## PEEBLES vs. CASE.

manner. Of six signatures, admitted to be his, now before me, only one is signed David F. Smith, three D. F. Smith, one Fred. and one Frederick Smith.

As to the state of the evidence in regard to the handwriting of the witnesses to the Peebles will, it preponderates in favor of the genuineness of that instrument. The signature of Mr. Parsons seems almost identical in both. That of Mr. Smith, allowing for the variance from "David F." to "D. Frederick," admits of the same remark, in my judgment. Indeed, Mr. Parsons himself says that, looking at the signature of his name alone, he sees no reason to doubt its genuineness. A witness was called, who gave the same opinion, and no effort was made to disprove it. In respect to Smith's signatures, Mr. Dunlap testified that there was a partial resemblance between both of them and Smith's writing, but not strong enough to identify either; he should rather think that he did, than that he did not, write them both, but his impression was strongest in favor of the one signed "David F. Smith." Mr. Case says that, as to the signature D. Frederick Smith, there is a resemblance to Smith's writing, and he could not say it was not his; does not believe it to be genuine, from the fact he had never seen it written in that way. He adds that, at the date of the will, he knew nothing of his signature. Two witnesses were called to impeach the signature "D. Frederick Smith," and expressed the opinion it was not in Smith's writing; but the value of their judgment in the matter may be readily seen, when it is stated that they both gave the same opinion in regard to a number of signatures and letters which Smith acknowledged to be written by him.

The denial of witnesses as to the formalities required by statute, for the due execution of a will, where they do not recollect the occasion of the execution, can have no greater force than the failure of recollection as to the occasion. Of course, if they have forgotten the main occurrence—if they do not remember the transaction as a whole, they do

## PEEBLES vs. CASE.

not remember the parts. If so important a part as the signature of their names as witnesses has escaped recollection, the accompanying incidents must have shared the same fate. The same line of reasoning is applicable where the witnesses corruptly deny their participation in the execution. The denial of the principal event necessarily involves all the details in the same result.

I shall next advert to some other evidence which bears materially upon the case. 1. The testator abode at Dunlap's hotel, Parsons boarded in the same house, and Smith was employed at the Exchange Hotel, next door. If the testator, after having executed one will before these persons, altered and corrected it, it was natural that he should call them in again to witness the new instrument. 2. Smith states that he does not recollect that anything was said at the execution of the will, as to writing his place of residence; and yet he never witnessed a will before; and is not likely to have known of the provision of the statute on that point. 3. The will produced by Mr. Peebles is identified by Mr. Spooner. There was something unusual in the origin of this instrument, which has led to the existence of this testimony. It appears that Mr. Graham was involved in a burdensome litigation, and about the 12th of February, 1850, was apprised by his counsel, Mr. Cutler, that he desired him to secure the services of some other person. Through the intervention of Peebles, the suit was then placed in charge of Mr. Spooner. Having no means at his command, the testator proposed compensating his counsel by some testamentary provision; and, the proceedings in the cause requiring prompt attention, the execution of the will was not likely to be delayed. Now, Mr. Spooner states that he saw the will very soon after its date; that Peebles brought it to him, having previously put into his hands the papers in Graham's suit, and requested him to undertake the case. He had one or two interviews with Mr. Graham, and expressed some reluctance to assume the management of so onerous a case. He says, "After these

## PEEBLES vs. CASE.

interviews with Mr. Graham, Mr. Peebles brought over the will, showed it to me, and I examined it to see what its purport was, and whether it was properly executed. It became necessary for me to see Dr. Graham the same afternoon; I went with Mr. Peebles to Dunlap's hotel, where we saw Dr. Graham together. Mr. Peebles took out that paper and showed it to Dr. Graham, and said he had showed it to me, and it was all right, and I was going to undertake his suit; I then told the Doctor I did not want anything of that kind; I would undertake his suit for him,—he was in poverty,—and argue the motion that was coming on. Dr. Graham said Mr. Peebles had been a good friend of his; he had taken Peebles' advice, and he did not want anybody to work for him for nothing. We then went on and talked about business—the suit in question. There is not the slightest doubt in my mind, the will shown me by Mr. Peebles is the one propounded for proof by him. The impression on my mind is, that I was one-eighth legatee in the will shown me; there was no question in my mind about that; I recollect also, that I was made executor in the will shown me, and also that Mr. Peebles had four-eighths of the estate; that is the impression on my mind. I can't say that I recollect any other of the provisions of the will; I took no particular note of it; there were no interlineations at all in the will shown me; the paper was a clear one; if there had been interlineations I should have noticed it, and commented upon it. When Peebles showed the will to Graham, he took it out, opened it, and showed it to Mr. Graham, holding it in his own hand, and said, I have shown this to Mr. Spooner; I could see it was the same will he had shown me before." \* \* \* "After Mr. Peebles showed Mr. Graham the will, he Mr. Peebles retained the paper, so far as I knew." 4. Mr. Outler states that a short time before February 12, 1850, the testator "stated repeatedly, that he had made a will in favor of Mr. Peebles, devising his property to Mr. Peebles; or that he intended to make such a will. I think, on one oc-

## PEEBLES vs. CASE.

casion, he said he had made it." 5. Mr. King testifies that on the 25th of February, 1850, on the occasion of a motion made in the suit pending in the Common Pleas, the testator said "he had made his will, and left his property, or the bulk of it, to Mr. Peebles." 6. The will produced by Mr. Case is endorsed,—“Last will and testament of Francis Graham, dated and *executed* the 15th of February, 1850.” The will propounded by Mr. Peebles, is endorsed,—“Dated and *executed* the 15th day of February, 1850.” Both of these endorsements are in the handwriting of the deceased, and they assert the *execution* of both the instruments, on the same day.

Had the evidence stopped at this point, I do not see how any reasonable doubt could have existed as to the genuineness of both wills. Thinking it, however, a proper case for the examination of the parties producing the instruments, I examined Mr. Peebles and Mr. Case, and a circumstance was somewhat singularly disclosed, still further favoring the ascertainment of the truth in this remarkable case.

7. Mr. Peebles stated that the instrument offered by him for probate, was handed to him by the testator, he thinks the day of its date, to take charge of it, and also for the purpose of seeing whether Mr. Spooner would act under it. He testified that the instrument had remained in his possession until it was deposited in this office for proof.

8. Mr. Case stated, that the will produced by him was found with other papers, in the pocket of an old coat belonging to the deceased, taken from his desk after his death, when it was first opened at Dunlap's hotel, as already mentioned. At that time, Peebles took possession of the papers in the desk, and the coat was thrown aside as worthless. Mr. Case took it home, with Peebles' permission. On learning this fact, I directed Mr. Case to produce all the papers so discovered by him. He did so; and in the bundle produced were two old wills of the testator, one endorsed, “Last will and testament of Francis Graham, of the city of

## PEEBLES vs. CASE.

New York, dated and executed 30th Oct., 1849 ;” and the other, “The last will and testament of Francis Graham, 8th Nov., 1849.” There was also a wrapper endorsed, “The last will and testament of Francis Graham, 8th Nov., 1849.” On a careful examination of the bundle, another wrapper was discovered, having the following endorsement :

“Old

Wills of Francis Graham,

30th Oct., '49.

Vide 8 Nov., '49.

*Revoked by one confided to the care of C. G. Peebles, Esq.”*

All these endorsements are in the handwriting of the deceased ; and the memorandum thus found affords a conclusive corroboration of the fact stated by both Peebles and Spooner, in relation to the custody of the Peebles will. Besides the declaration endorsed on that will by the deceased, that it was *executed* February 15, 1850 ; besides the evidence of Mr. Spooner and Mr. Peebles, establishing that the document was in Mr. Peebles' possession, with the knowledge and approbation of Graham,—we have here, from an unexpected quarter, another declaration in the writing of the deceased, found in the same place where the Case will was discovered, and stating that he had confided his will to the care of Mr. Peebles. Here is a will, written and subscribed by the testator,—endorsed by him as *executed*,—from the character of its contents, evidently a revision of another altered will of the same date,—purporting to be attested by the same persons who witnessed the altered will,—delivered by the testator to one of the executors, for the purpose of exhibiting it to another person,—exhibited to that person alone, and also in the testator's presence,—and retained by the executor until the testator's decease. And on the other hand, we have the altered will found after the testator's death, in his coat pocket, and never shown to have been out of his possession ; and in the same receptacle a memorandum is discovered, declaring that his will had

## PEEBLES vs. CASE.

been entrusted to the charge of his executor. The evidence is circumstantial, but the circumstances are all singularly harmonious, consistent, and sustained by proof from independent and different sources. Mr. Spooner, Mr. Peebles, and the written declaration of the testator, endorsed on the will, all unite to establish its genuineness, and even the memorandum produced by Mr. Case himself, aids in its authentication. By the force of such testimony, in connection with the other facts already considered, I am constrained to the conclusion that the instrument propounded by Mr. Peebles is the last will and testament of Francis Graham, and bears the genuine signatures of the subscribing witnesses.

When the witnesses to a will are dead, or have forgotten the circumstances of the execution, the performance of the formalities required by statute may, after proof of their signatures and that of the testator, be inferred or presumed from the recitals of the *testatum* clause. (*Chaffee vs. Baptist Miss. Conv.*, 10 Paige, 85; *In the Goods of Leach*, 12 Jurist, 381.) On the supposition that Parssons and Smith have lost all recollection of the transaction, the court, if satisfied from other evidence that they did in fact witness the will, may admit it to probate. I have no doubt at all that, even when the subscribing witnesses corruptly deny the execution, and, *a fortiori*, where they are mistaken, the proof of the will may be supplied from other sources. It is an error to suppose that the law has invested the subscribing witnesses with absolute power to defeat the ends of justice. It would be a most dangerous doctrine, to hold that the validity of so important an instrument depends entirely on the honesty of the two witnesses, and that if they deny its execution the will inevitably falls. Such may often be the consequence in the absence of any other proof, but it is not a necessary consequence in law; such a tremendous power is placed in no man. The proof of a will abides by the same rules of evidence as prevail in all other judicial investigations. The question for the court is,

## PEEBLES vs. CASE.

the *factum* of the instrument, and that may be proved in the very teeth of the subscribing witnesses. Suppose (by way of illustration) that a will duly executed, and subscribed by the testator with the witnesses in the presence of a number of disinterested persons, were repudiated by the subscribing witnesses; would it not be competent to prove its due execution by these by-standers?

I am not aware that any case precisely of this kind, has before occurred; but it has often been conceded that a will may be proved against the evidence of subscribing witnesses. The witnesses have frequently been contradicted as to particular facts, such as capacity, the signature of the testator, &c. In *Lowe vs. Jolliffe*, 1 Wm. Bl., 365, the three subscribing witnesses to the will, and the two surviving ones to a codicil, and a dozen servants to the testator, all unanimously swore him to be utterly incapable of making a will; and yet the jury were satisfied of the perjury of all the witnesses except one, and the validity of the will was established. In *Jackson vs. Christman*, 4 Wendell R., 277, Justice Sutherland said, "If the subscribing witnesses all swear that the will was not duly executed, the devisee may, notwithstanding, go into circumstantial evidence to prove its due execution." In *Hitch vs. Wells*, 10 Beavan, 84, one of the witnesses was dead, and his signature was proved. Another witness testified that he made his mark to the will, but did not remember that the testatrix signed it. But the other witness denied her signature, and swore that she could not write her name. Five persons were called to prove she could not write, and three to show the contrary. The judge and jury disbelieved her, and a verdict was rendered in favor of the will. On a motion for a new trial, Lord Langdale said, "In a case where one witness is dead, another is not to be believed, and the third witness cannot recollect, everything in favor of the instrument is to be presumed." It is evident in this case, that Baron Alderson, who tried the cause, and the Master of the Rolls, both acceded to the position that the will could be

## PEEBLES vs. CASE.

proved notwithstanding the denial of its execution by one of the subscribing witnesses. There are other cases which go to sustain the same doctrine (*Handy vs. The State*, 7 *Har. & Johns.*, 42; *Dudleys vs. Dudleys*, 3 *Leigh.*, 436; *Le Breton vs. Fletcher*, 2 *Hagg.*, 558; *Mackenzie vs. Handasyde*, 2 *ibid.*, 211; *Landon vs. Nettleship*, 2 *Add.*, 245; *Keating vs. Brooks*, 4 *Notes of Cases*, 253); and in the English ecclesiastical courts, even after the recent act of Victoria (1 *Victoria*, *ch.* 26), respecting the execution of wills, probate has been decreed where the witnesses have explicitly denied some of the formal requisites of due execution; lapse of time and other circumstances being laid hold of by the judge to show that the witnesses had forgotten or were mistaken. (*Chambers vs. The Queen's Proctor*, 2 *Curteis*, 433; *Gove vs. Gawen*, 3 *ibid.*, 151; *Blake vs. Knight*, *ibid.*, 547; *Burgoyne vs. Showler*, 1 *Robertson*, *p.* 5.) But, apart from all decisions, there seems to me abundant authority for the position I maintain, in the elementary principles of reason and justice. The law seeks the truth; and the idea of clothing the evidence of any person with such a peculiar character that the opposing party is precluded from showing its falsity, is alike perilous and novel. As to the effect, nature and character of their testimony, the subscribing witnesses to a will stand on the same ground as other witnesses, on the subject of contradiction. They are not presumed to be infallible, nor is their evidence conclusive. They have no immunity from contradiction; and if untruth, mistake or want of recollection be alleged, it is not only competent to prove it, but on its being proven, and the judge being satisfied of the validity of the will, decree of probate should follow.

The counsel for the contestant urged that evidence of handwriting could not be taken to prove the signatures of the subscribing witnesses, except in the precise contingencies mentioned in two sections of the statute—that is, where the witnesses are dead, insane, out of the State, or incompetent to testify. (2 *R. S.*, *p.* 58, § 9; *Laws* 1837, *ch.*

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PEEBLES vs. CASE.

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460, § 20.) But these sections are directory only in the instances specified, and are not obligatory in other cases not specified. They are not exclusive of the power necessarily resident in every court, to admit all competent proof material to a pending issue. An attempt was made in the Revised Statutes, to codify the law so far as it could well be done, in order to afford a convenient guide for surrogates in the administration of their powers and duties. So far as these directions go, they are to be followed, but a case beyond their limit and not provided for, remains to be dealt with according to the general principles prevailing in all tribunals. Having jurisdiction of the subject matter, the Surrogate, where the course of procedure is not laid down, must dispose of it according to the established rules of evidence, unless he has been restrained from doing so by express statutory provision. The principal subject of jurisdiction, the probate of the will, carries every proper incident along with it, in all cases where the statute is silent as to the course of proceeding. (*Laws of 1837, ch. 460, § 71.*) I am satisfied, therefore, that it was competent for me in this case, to take proof of the handwriting of the testator and of the subscribing witnesses, or of any other facts and circumstances tending to show the witnesses were mistaken, and that the will was duly executed; and having come to the conclusion that the will was executed according to law, it is my duty to give sentence of probate.

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M'GUIRE vs. KERR.

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## M'GUIRE vs. KERR.

*In the matter of proving the last will and testament of  
CATHARINE KERR, deceased.*

On allegations filed by the daughter and only next of kin of the deceased, the evidence of testamentary capacity, and of due execution not being satisfactory, and the will not having been signed by the testatrix and the witnesses at the end, the decree of probate was *revoked*.

Where, at the time of execution, the decedent was in a state of stupor, though perhaps capable of being aroused so as to perform a sensible action, the proof to establish a rational act should be of the clearest character; and that failing, probate should be denied.

The statute requiring the will to be signed at the end by the testatrix and the witnesses, demands that they should all agree as to what the end of the will is; and where the signature of the testatrix purported to be signed in one place; then followed the appointment of executors, to which the names of the witnesses were signed; and then came a further provision, to which the name of the testatrix was again put—the witnesses and the testatrix in no instance coinciding as to where the end of the will was—*Held*, that the will was not validly executed.

J. M'KEON and A. L. ROBERTSON, for next of kin.

I. The execution of this will took place not earlier than three o'clock of the afternoon of the third day before her death.

II. As the decedent was then advanced in years, weak, in the last stages of a violent typhus fever, generally in a state of stupor, insensible to occurrences around her, occasionally delirious with incoherent mutterings, and only

## M'GUIRE vs. KERR.

capable of answering a question on being roused, "*her capacity was not so alive as to prevent her executing an instrument of the contents of which she was not aware.*" (*Billinghurst vs. Vickers*, 1 *Phil.*, 193; *Harwood vs. Baker*, 3 *Mo. Pr. C. C.*, 285; *Merrit vs. Johnson*, 2 *South*, (N. J.) 455; *Tomkins vs. Tomkins*, 1 *Bail (S. C.)*, 96.)

III. The relation of the person who drew the will, to the decedent, and his interest in its provisions, raise the presumption of undue influence, not repelled by sufficient proof of spontaneity and understanding. (*Huguenin vs. Baseley*, 14 *Ves.*, 287; *Harwood vs. Baker*, 3 *Mo. Pr. C. C.*, 290; 1 *Swinb. on Wills*, 191; *Marsh vs. Tyrrell & Harding*, 2 *Hag. Ec. R.*, 87; *Billinghurst vs. Vickers*, 1 *Phil.*, 199; *Ingram vs. Wyatt*, 1 *Hag. Ec. R.*, 449; *Baker vs. Batt.*, 2 *Mo. Pr. C. C.*, 321, *pr. J. Parke.*)

IV. The conduct of the draughtsman of the will is attended with circumstances of suspicion.

1st. His denial of being the established spiritual director of the decedent.

2d. His supervision even of letters to her daughter under pretence of literary correction. (*Griffiths vs. Robins*, 3 *Madd. R.*, 191; *Whelan vs. Whelan*, 3 *Cov.*, 583.)

3d. His interference to procure her removal from the care of relatives in her own house, to a religious hospital, under the care of hired nurses.

4th. His exclusion of all persons at the execution, except parties interested, and a strange witness summoned for the occasion. (*Brydges vs. King*, 1 *Hag. Ec. R.*, 262, 310; *Blewitt vs. Blewitt*, 4 *Hag. Ec. R.*, 419.)

5th. His interference by taking possession of money belonging to her, and disposing of it, and demanding the keys of the house from Mrs. Norton.

6th. His activity in getting up the will without the presence of counsel; his suggesting provisions in it, and

## M'GUIRE vs. KERR.

inducing her to sign it, by representing it to be merely temporary.

7th. His omission to have her read what she was to sign.

8th. His testimony as to the decedent's actual signing, and as to her name, and his eagerness to deny all improper influence in advance.

V. The will or codicil was not in due form.

1st. The signatures were not the decedent's, and there is no proof she acknowledged them as such. Her assent to the instrument was before it was signed. (*Best on Presumption, Law Lib., N. S., Vol. 31, p. 223*; *Ilott vs. Genge*, 4 Mo. P. C. C., 266; *Grant vs. Grant*, 1 Sand. Ch., 237; *Chaffee vs. Bapt. Miss. Con.*, 10 Paige, 85; *Blake vs. Knight*, 3 Curt., 547.)

2d. If the will ended with the clause appointing executors, it was not signed by the decedent at the end. (2 *Robertson*, 140; 13 *Jurist*, 289; 6 *Moore P. C. C.*, 404.)

3d. If it ended before the clause appointing executors, or after that directing the payment of debts, it was not signed at the end by the witnesses. (5 *Notes Cases*, 428; 6 *Notes Cases*, 20; 4 *Ib.*, 480, 253, 469, 260; 5, 375; 2, 350; 2 *Curt.*, 342; 3, 748; 1, 912; *In Bonis Batten*, 7 N. C., 289; *In Bonis Shadwell*, 7 N. C., 377; *In Bonis Pain*, 14 *Lond. Ju.*, 1032; 1 *Eng. L. and Eq. R.*, 635.)

## J. SPARKS, for Executors.

I. The testatrix, Catharine Kerr, at the time of making her will and codicil, was of sound mind and memory, and capable of disposing of her property by will. However weak her mind may have been—unless she was entirely deprived of her understanding—her will and codicil cannot, for that reason, be avoided. (*Stewart's Exr. vs. Lispenard and others*, 26 *Wend.*, 255; *Blanchard vs. Nestle*, 3 *Denio*, 37; *Clarke vs. Sawyer*, 3 *Sandford Ch. Rep.*, 351.

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M'GUIRE vs. KERR.

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II. Both of the subscribing witnesses to the will and codicil testify that the testatrix signed the will and codicil. R. Kein swears positively that she made the three signatures. M. M. Smyth is only in doubt about the second signature. Their testimony is supported by Catharine M'Ginnis, the nurse, who states that she heard from the Sisters in the Hospital, on the same day that the will was executed, that a will had been drawn, and that she saw pen, ink and paper in the room. Also, by Honora Norton, who testifies that the testatrix told her, after the will was drawn and executed, that she (the testatrix) was "after making her will," meaning that she had already made it.

III. The conveyances, &c., offered in evidence by the contestant, and alleged to have been executed by the testatrix in her life time, cannot be admitted in evidence, for the Court to compare the signatures thereto with those to the will, and thus by comparison form an opinion as to the genuineness of the signatures of the testatrix to the will.

IV. The misspelling of the surname Kerr in the signatures is no evidence that the will and codicil were not signed by the testatrix. R. Kein, one of the subscribing witnesses, may have dictated to the testatrix, as she wrote her name, the letters composing her name, as he supposed it was spelled.

V. The testatrix signed the will and codicil in the presence of both of the subscribing witnesses.

VI. The acknowledgment of the testatrix, that the instrument she signed was her last will and testament, is a sufficient compliance with the statute. It is immaterial whether the testatrix acknowledged the instrument prior or subsequent to signing, if the whole was done in one act. (*Doe vs. Roe*, 2 Barb., Sup. Ct. R., 200.)

VII. Richard Kein swears positively that the testatrix

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M'GUIRE vs. KERR.

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requested him and Smyth to sign their names as witnesses to the will. The law presumes such to have been the case. (*Butler vs. Benson*, 1 Barb., Sup. Ct. R., 527; *Doe vs. Roe*, 2 Ibid., 200; *Brinkerhoff, &c., vs. Remsen and Brinkerhoff*, 8 Paige, 488; *Chaffee, &c., vs. Bapt. Miss. Con.*, 10 Paige, 85.)

8th. Where one of the subscribing witnesses to a will swears that all the formalities required by the statute were complied with in the execution thereof, the will may be admitted to probate. (*Nelson vs. M'Giffert*, 3 Barb. Ch. Rep., 158; *Jauncey vs. Thorne*, 2 Ibid., 40.)

9th. The will of the testatrix was executed substantially according to the provisions of the Revised Statutes, which is sufficient. (*Nelson vs. M'Giffert*, 3 Barb. Ch. Rep., 158; *Seguine vs. Seguine*, 2 Barb. Sup. Ct. Rep., 385; *Whitbeck vs. Paterson*, 10 Ibid., 608; *Ruddon vs. M'Donald*, 1 Brad. Rep., 352.)

THE SURROGATE. The deceased was a widow, and her only next of kin is a daughter residing in the State of Maryland. The will and codicil passed to probate upon constructive service of the citation by advertisement pursuant to the statute. Within a year after the probate, the daughter filed allegations against the validity of the will, and the competency of the proof thereof; and I have now to decide upon the sufficiency of the proof. There are several grounds of objection.

I. Want of testamentary capacity.

The deceased was attacked with typhus fever, and was removed from her residence to St. Vincent's Hospital, where the will was made, and where she died. Dr. Power, who was her attending physician at the Hospital, and who saw her daily, states that when he first saw her she appeared to be "very stupid and delirious;" that she afterwards rallied for two or three days, and then relapsed; that after the re-

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M'GUIRE vs. KERR.

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lapse, Father Kein wished to have a consultation of physicians; that for the last four or five days of her life she "lay in a kind of stupor." He says: "I should suppose she was insensible. If you aroused her, you might get an answer from her, but that, perhaps, incoherent. This was for the last four or five days of her life. This is a usual occurrence in that disease. It is caused by derangement of the entire system." The Doctor was then asked whether, from his knowledge of her condition, she was able, in his opinion, to have made the subscriptions of her name to the will; and he expressed the opinion that during the "rally" she was able, but not after the "relapse." On cross-examination, he said: "I have not a distinct recollection how long Mrs. Kerr continued in a stupor. I think it was more than two days. It may have been two days or five days; but I think it was more than two. When not in a stupor, she was able to converse, and also to write her name. When she first came in there she was delirious, and then improved; and then, in the latter stages of her sickness, she was delirious also. She was delirious when she died—that is, the last visit previous to her death she was delirious. When aroused from stupor she muttered incoherently, and you could not comprehend what she said."

Anne Gorman states that the decedent, the day after she went to the Hospital, spoke "very sensibly." She adds: "I saw her every day; sometimes I spoke to her, and she would answer me, and fall away again." Mrs. M'Ginnis nursed the decedent at the Hospital two weeks, night and day. She testifies that Mrs. Kerr was in a "kind of stupid state" all the time,—occasionally sensible for a short while. "Sometimes she would talk a little; but it would not be long, and then she would go off into a slumber again." She "might be sensible half an hour at a time." "She was not able to sit up, three or four days before she died, unless she was propped up in bed. She could not help herself. She never took her drinks into her hands, but I put them in her mouth for

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M'GUIRE vs. KERR.

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her." This witness states that the will was drawn three or four days before Mrs. Kerr's death, and that upon that occasion she was requested by Father Kein to go down stairs.

Dr. Murray, who visited the decedent in consultation with Dr. Power, says: "She was rather in a state of insensibility—the state in which persons usually are just previous to death. It was the day previous to her death. I was desirous of seeing her again, and called the next day, but was told she was dying, and did not go in. She showed a listlessness, and appeared unconscious of what was said to her. She had all the symptoms of a sudden dissolution when I first saw her." Mrs. Norton testifies that the decedent was taken sick on the 1st of May; was taken to the Hospital on the 5th, and died on the 20th. She visited her there daily, and generally two or three times a day. She says, "I think it was about ten days before she died that I first thought she was at all unsettled in her mind. At the latter end of her sickness, before she died, her mind seemed to be affected—she seemed to be stupid. It was three or four days before she died, she got quite stupid. When she was sick in Second street, she dozed a good deal through the day. She would doze and fall asleep in the day time, after she went to the Hospital, while I was there; but that was at the latter end." Mrs. Norton mentions some conversation she had with the decedent. "I asked Mrs. Kerr if I should write to her daughter. She said, No, the poor child would hear of her death time enough." \*

\* "She told me one day she was after making her will. She told me to tell my husband not to let any of the apartments, for it was to be sold. I asked if I should call to let Father Kein know how she was, as he was rather delicate. She said he was after being there; was going out a bit into the country, and she said I need not call there. I mean by her saying she was after making her will, that she had made it. I went in the next day, and took some clothing to her. She gave me \$47, and the keys of her bureau and the keys of the house where she lived, &c. I asked her

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M'GUIRE vs. KERR.

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how much money there was; she told me to take what was there, and the keys, and to put them in no person's hands." "I gave one of the Sisters in the Hospital the money. \* \* Mrs. Kerr first gave the Sister the money and the keys, the same day she went there. She then took them away from her, and gave them to me the day after the will was spoken of, and I gave the Sister back the money the same day. She died about seven days after the time the money and the keys were given, as near as I can recollect." On being asked the condition of the decedent's mind when she gave her the keys and money, Mrs. Norton said, "She seemed as settled in her mind as ever she did, only she was weakly. She told me not to come too near her breath, that she had a very bad fever. Two days after that it seemed as if she was not settled in herself," &c.

This is substantially all the evidence relative to the capacity of the decedent, exclusive of the testimony of the subscribing witnesses to the will and codicil.

II. The time of execution.

The will and codicil are not dated. The time of their execution is material. Mrs. Norton states that when the decedent spoke to her about her will, it was seven days before her death. Elsewhere she says, she died about seven days after the money and keys were given to her. Again she says, "She told me this on Tuesday, and the next day (Wednesday) she gave me the keys. This is as near as I can think. It was on the previous Wednesday she left Second street." \* \* "I think she died Thursday, as near as I can recollect." Mrs. Norton elsewhere states that the decedent died on the 20th of May. The original petition for probate dates her death on the 21st, which was Wednesday. Mrs. Norton says, Mrs. Kerr went to the Hospital on Wednesday, but also fixes the date on the 5th of May, which was Monday. No great dependence can, therefore, be placed upon her exact recollection of precise dates. Now, on the other hand, Mrs. McGinnis, the nurse, says the will was drawn three or four days before Mrs.

## M'GUIRE vs. KERR.

Kerr's death. The recollection of Mr. Smyth, one of the attesting witnesses is very vague. He says Mrs. Kerr was in the Hospital three or four weeks; and though he states the will was executed May 15th, says, "I don't recollect how long after this Mrs. Kerr lived. It could not have been longer than a fortnight." Father Kein, in his first effort to fix the date, says: "I administered the sacraments to this woman before the will was spoken of. There was no will spoken of then. After that I called in Mr. Phelan, because I saw she was dying—that she would soon die." \* \* Again he says: "She next spoke about her will, when she was about to make it, a day or two, or a few days before her death. I think she lived three days after she made her will. I can't recollect precisely." \* \* "I was there twice that day—first about noon, when she expressed a wish to have a will drawn; and the second time, when I brought Mr. Phelan, and drew the will, in the afternoon. I can't say exactly what hour. In the morning, when I came, I found her sinking fast. There was only one physician attending her then, and I ordered a consultation, saying I would pay for it, if there were not means in hand to pay for it. I was there only twice that day. I administered the sacrament to her before that day—one or two days before." It thus appears that in the morning of the day the will was made, Father Kein thought "she was dying,"—"would soon die,"—was "sinking fast," and he ordered a consultation of physicians. Dr. Power testified that the consultation was ordered "after the relapse;" and Dr. Murray, the consulting physician, states that "it was the day previous to her death" he called. If he attended the same day the consultation was ordered, the inference would be that the will was executed the day before she died, and the codicil the same day she died. However this may be, it is evident from Father Kein's statement, in connection with the evidence of the physicians, that the will was executed very shortly before her death, and after the relapse had become so plainly indicated that she was thought to be

## M'GUIRE vs. KERR.

sinking, and a consulting physician was directed to be called in. This brings the date of execution within the period when the decedent lay in a stupor, as described by Dr. Power. He says, "When aroused from stupor, she muttered incoherently, and you could not comprehend what she said."

## III. Proof as to execution.

It is not impossible that a person in such a condition might, on being aroused from stupor, be capable of sensible action; but the proof to establish that such was the fact should be of the clearest character. Smyth, one of the subscribing witnesses, never saw the decedent except at the times the will and codicil were attested by him. His recollection of the transaction is evidently imperfect. He states that both papers were read to the decedent by Father Kein, and that she signed them; but he is unable to state whether she wrote with assistance or not. He says that after the will was read she "agreed" to it; and though he does not recollect exactly the words, thinks she said it was all right. He states that no one else was present, while Father Kein testifies that Mr. Phelan, one of the executors, was there. He says that she received no help from any person while he was in the room, and that "she raised herself;" and Father Kein states that he "assisted her, raised her in the bed, and supported her when she signed the will." At one time he says he was requested by Father Kein to witness the will, and the decedent heard the request; and again, that nothing was said about witnessing the will before Mrs. Kerr. What transpired in the presence of this witness was not of a nature to afford a very accurate test of the capacity of the decedent; and it is obvious that very little dependence can be placed upon his recollection of the circumstances.

The will in question is written on the first and second pages of a sheet of letter paper. It closes on the second page, and purports to be signed and attested in this way:

## M'GUIRE vs. KERR.

"To the children of Mary Dow, residing in Ireland, in county Kilkenny, Give and bequath two Hundred dollars, to be equally divided between them. If there be a balance my executors will divided it among my relations that are not herein mentioned.

"CATHERINE" KEER.

Phelan,

"I herby appoint Mich<sup>l</sup> of 2d st., and John Kelly, of 9th st., as my executors to this my last will testament.

"Witnesses,

R. KEIN,

"MATHEW M. SMITH.

pay

"I herby order my executors to, all my lawful and debts & funeral expenses—should it please the Almighty now to call me. This they will do before paying any legacy above mentioned.

"CATH" KEER."

Now, Smyth says he thinks the decedent signed the will but once, and that Father Kein wrote nothing on the will after she signed it—that her name was not signed to any part before he came into the room, and he saw her make the *first* signature. There was nothing written below the place where he put his name as a witness, when he signed. He says, "The second signature (of the name of Mrs. Kerr) I am doubtful about—I don't consider it the same hand as the first, and I don't recollect seeing her sign it." Mr. Smyth here differs materially from the other witness, and on an important point. Father Kein states that he wrote the will at the dictation of the decedent—that when she signed it he supported her body and her arm above the elbow—that she wrote both the signatures on the second page—she was perfectly sensible—he did not take told of her hand and guide it, and did not write her name—all on the first two pages was written before she signed it—after she

signed the first time, he thinks he went back to the bed a second time, raised her up, and she signed again. I do not think it necessary to enter into a more critical examination of the evidence of this witness. The name of the decedent was Catharine Kerr. It is abundantly proved that she wrote her name in that way ; and, besides the evidence of a witness against the genuineness of the signatures to the will and the codicil, I have had placed before me several documents executed by her, to which her name is invariably subscribed as Catharine Kerr. It is strange, therefore, that the signatures to the will and codicil are "Catharine Keer." Father Kein calls her Catharine Keer in his testimony, and the original probate was granted in the same name ; but there is no pretence that was her name, or that she was ever so called except by the two witnesses to the will. If Mrs. Kerr signed the will, she did not sign in her own name, but in the witnesses' version of her name. This circumstance prevents me from being satisfied that the will was subscribed by the decedent, as stated by the attesting witnesses ; and, if on so material a point they fail to recollect with accuracy, and the evidence shows that they are mistaken, or leaves the correctness of their statement in doubt, then, in a case where, as I have stated, the circumstances call for the most satisfactory elucidation of the whole transaction, such clear and unequivocal proof as the law demands, is wanting.

#### IV. Form of the will.

But, independently of these considerations, there is another objection which of itself I deem fatal to the will. The statute directs that the will shall be subscribed by the testator "*at the end*," and that each of the witnesses shall sign his name "*at the end of the will*." The same place is here spoken of—*the end* ; and the testator and the witnesses must all unite in authenticating the instrument at its point of completion. I do not mean to refine as to the exact place where they are to sign ; but the object of the law has been not only to exclude a signature at any other part, but

also to have the concurrence of all the parties as to the end of the will, and to secure the instrument from interpolation or unauthorised addition. It is not to be regarded as a merely arbitrary rule. The provision is a judicious one, and care should be taken not to break in upon it, by lax interpretation. In England the courts have gone great lengths in exacting a literal compliance with the statute which directs the will to be signed "at the foot or end thereof." If an unnecessary and unreasonable blank space is left between the signature of the testator and the end of the will, probate is denied on that ground alone. (*Williams on Exrs.*, p. 65.) Perhaps since the case of *Smee vs. Bryer* (6 *Notes of Cases*, 420, affirmed in the Privy Council), too rigid a rule has prevailed. In the *Goods of Lewis Henry*, 2 *Robertson's Ecclesiastical Reports*, 140, the will ended on the second page, having a blank space under the last line, of one inch and three-tenths, and at the head of the third page the words, "Signed by me in presence of the undersigned," immediately after which followed the signature of the testator, and then an attestation clause signed by the witnesses; and it was held, by Sir Herbert Jenner Fust, not to have been validly executed. In the *Goods of Milward*, 1 *Curtis*, 912, the will was written on two sides of paper, the testator signed at the bottom of the first side, which signature was attested, and that side terminated with an unfinished sentence, and the will concluded on the second side, "Dated this 11th day of April, 1838;" but there was no signature in that place: the will was denied probate. In the present case, if the first signature of the name of Catharine Kerr is at the end of the will, there is no attestation of the witnesses at that place. After that comes the appointment of executors, and this is attested by the witnesses, but not subscribed by Mrs. Kerr; and then comes another clause purporting to be signed by Mrs. Kerr, but which is not attested by the witnesses. The decedent and the witnesses—supposing Mrs. Kerr's signature to be genuine—do not agree upon any one point as the end of the will. The

last clause is not attested, and it must be excluded from probate. The clause next to the last is not signed by the testatrix, and must be excluded likewise; and then, all that precedes the first signature of the testatrix, is not attested at its end—so that the entire instrument must be rejected. I think, that the testator and witnesses must agree as to the instrument—what it is, and where its end is. But for the testator to affirm, by his signature, that one part is the will, and the witnesses to affirm, by their signatures, that another clause is to be added, is such a disagreement as defeats the requirement of the statute that the will must be signed by all parties at the end. The act of authentication must take place at the termination of the testamentary disposition, and the testator and the witnesses must concur in determining that point. The law is no more fulfilled by the testator signing in the middle of the will, and the witnesses attesting at the end, than by the witnesses signing in the middle, and the testator at the end. They must all subscribe at the end. The wisdom of this statutory provision seems to me abundantly illustrated by the evidence in this case. This defective execution has not been remedied by anything contained in the codicil; for the codicil is contained on a separate sheet of paper, and does not in any way refer to the will. I am therefore of opinion, that in view of the testimony respecting the bodily and mental condition of the decedent at the period of the alleged execution of the will, the presumption against its valid execution has not been removed by clear and satisfactory proof. This applies with greater force to the codicil. In addition to these grounds, the will has not been executed according to the requisite statutory ceremonials. There must, therefore, be sentence declaring the instruments insufficiently proved, and invalid, and annulling and revoking the probate.

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KAPP vs. THE PUBLIC ADMINISTRATOR.

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## KAPP vs. THE PUBLIC ADMINISTRATOR.

*In the matter of the Estate of PETER EIKES, deceased.*

THE provisions of the statute directing certain articles to be set aside in the inventory for the benefit of the widow and minor children of the deceased, are not limited to cases where the deceased was a *resident* of this State. These articles are not *assets*, do not belong to the executor or administrator, and are not the subject of administration and distribution.

Where the intestate died on his way to this country, leaving a widow and minor children in Germany, and the assets left on board of the vessel came into the hands of the public administrator, nothing having been set apart in the inventory for the widow and children—*Held*, that the inventory should be reformed in that respect.

J. A. STEMMER, *for Petitioner.*

W. G. STERLING, *for Public Administrator.*

THE SURROGATE. The intestate died on his passage to this country, leaving a widow and minor children in Germany, where he had been previously domiciled. He never gained a residence in this State, but the assets left on board of the vessel in which he died, came into possession of the Public Administrator of the City of New York. Nothing having been set apart in the inventory, for the widow and children, and creditors having appeared, whose demands will exhaust the whole estate, the widow now applies by her attorney in fact, for an order to reform the inventory in this respect.

The terms of the statute are, that "where a man *having a family* shall die, leaving a widow or a minor child or children, the following articles shall not be deemed *assets*, but shall be included and stated in the inventory of the estate, without being appraised." (2 R. S., p. 83, § 9.) The

## KAPP vs. THE PUBLIC ADMINISTRATOR.

first statute on this subject, entitled "an act for the relief of widows and orphans" (*Laws of 1824, p. 32*), applied only to the case of a widow left with a minor child or children, and directed that the property thus reserved, should, with some exceptions, be the same as was exempt from seizure on execution, or distress for rent. The language of this provision in the former as well as in the present statute, differs from the statute exempting property from levy and sale under execution, in this important particular, namely: in the former the contingency is, "Where a man *having a family* shall die," &c., and in the latter it is, "The following property, when owned by any person being a *householder*, shall," &c. As the former was borrowed from the latter, this variation in terms is significant. So the section in regard to inventories gives to the widow and children certain articles, "put up and kept for use by his *family*;" while that in regard to executions exempts the same articles "put up or kept for use in any *dwelling house*." (2 *R. S.*, p. 367.) There is some meaning also in the circumstance that the words "for use by his *family*," in the section relating to inventories, were substituted by the legislature for the words "in any *dwelling house*," as originally reported by the Revisers. (3 *R. S.*, 2d ed., p. 639-640.) The inference is plain, that the section was carefully framed, and with regard particularly to the consideration whether or not the deceased had been a "*householder*," and had a "*dwelling house*." The benefit of the provision was not made dependent on these conditions, and words which would have had that effect have been excluded from the statute. The general design was to reserve for the use of the widow or children property about commensurate with what was exempt from execution. The policy of the law in preserving from the reach of creditors certain articles of necessity, was extended for the advantage of the family, and without limitation as to residence. So when other articles not exceeding one hundred and fifty dollars in value were added to the exemption from execution, the

## KAPP VS. THE PUBLIC ADMINISTRATOR.

provision for the family of a deceased person was likewise enlarged. (*Laws 1842, ch. 157, § 2.*) It is now urged upon me to construe these statutes so as to restrain their application to the case of deceased persons who were inhabitants of this State. There is nothing in the letter of the law justifying such an interpretation; nor does the rule that the assets are to be distributed according to the *lex domicilii* affect the question. That rule applies to the surplus of the estate—to the assets remaining after payment of debts. But the statute declares that the articles to be reserved for the widow and children shall *not* be assets. They do not belong to the executor or administrator—do not go into the estate to be administered, but are taken out of it and given to the widow and children. They are exempted from distribution. The foreign law of distribution does not reach them, then, any more than the domestic law does.

It is true that it is generally an allowance in the nature of household furniture; but the only result of that is, that in case no specific articles of furniture are in this jurisdiction, the widow is limited to the amount of \$150 in other property. That she should be excluded from this because she is not a resident, or because her husband was not a resident, is more than the law has declared. The benevolent design of the statute has a subject, whether the deceased was an inhabitant or not; and so long as the legislature have not confined the benefit of this beneficent provision, it is hard to find any reason for narrowing the charities of the law by judicial interpretation. The same construction which would exclude a widow and orphan children in Germany, would shut them out, if the intestate had happened to have resided in New Jersey. This view brings the case nearer home. It is said, however, that if the assets of the deceased were distributed through several States, the widow might have the advantage of numerous exemptions of this kind. It will be time enough to consider that objection when it appears that an allowance of this kind has been made to her in any other jurisdiction. It is sufficient to

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MOORE vs. MOORE.

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say in the present case, that I see nothing in the letter or the spirit of the statute adverse to the claim now advanced by the widow.

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## MOORE vs. MOORE.

*In the matter of proving the last will and testament of ELIZABETH MOORE, deceased.*

THE reading of the will in the presence of the testator and the subscribing witnesses, and its subscription by all the parties in the presence of each other, is ordinarily sufficient evidence of a testamentary declaration, and of a request to the witnesses to attest the instrument. The minds of the parties meet on the essential points, through the medium of the reading, and acquiescence or consent to the attestation. No particular form is requisite in these respects, except that the testator shall communicate to the witnesses that it is his will, and he desires them to attest it. This can be done by reading and other acts, performed by a third person, provided an intelligent assent on the part of the testator be shown.

The will of a testatrix eighty-seven years of age sustained—there being proof of sufficient legal capacity, and of an intention in favor of the beneficiary expressed at the time of making the will, as well as previously and subsequently thereto. Where there is some evidence of a failure of mental power, consequent on advanced age, it is proper to show that the decedent acted with intelligence, and comprehended the effect of what she was doing at the time of the *factum* of the will, and that the provisions of the instrument were in consonance with her wishes and intentions expressed at other periods.

J. VAN BUREN and H. W. ROBINSON, *for next of kin.*

I. The testatrix, at the date of the execution of the will, was not of sound and disposing mind and memory.

II. The will has not been proved to have been duly executed. (2 R. S., 63, § 40.)

## MOORE vs. MOORE.

1st. It was not declared by Mrs. Moore to be her last will and testament, in the presence of two witnesses.

2d. Neither of the witnesses, Mr. and Mrs. Searle, were requested by the testatrix to witness the same. The only request for them to do so was from Alfred Moore, the beneficiary legatee, and not in the presence of the testatrix. Both swore positively that the testatrix made no request to them of any kind, and made no remark in their presence except in reply to an inquiry, of Gen. Sandford, if it was satisfactory. Gen. Sandford's recollection of the transaction is so indistinct as not to be relied upon.

III. At the time of the execution of the will, the sole legatee who gave the instructions for drawing the will, was the trustee and sole managing agent of the testatrix. Under these circumstances, the law raises a presumption of fraud and undue influence which it requires the strongest evidence to overcome. (*Wharton vs. May*, 5 *Ves.*, 27; *Gibson vs. Jeyes*, 6 *Ves.*, 279; *Welles vs. Middleton*, 1 *Cox*, 112; *Marsh vs. Tyrrell*, 2 *Hagg*, 110; *Bridgeman vs. Green*, *Wilnot*, 70; *Ingram vs. Wyatt*, 1 *Hagg*, *E.* 441; *Baker vs. Batt*, 1 *Curteis*, 125; *Barry vs. Butlin*, 1 *Curteis*, 638; *Croft vs. Day*, 1 *Curteis*, 839; *Sears vs. Shafer*, 1 *Barb. S. C.*, 408; *Crispell vs. Dubois*, 4 *Barb. S. C.*, 393; *Brice vs. Brice*, 5 *Barb. S. C.*, 533.)

This presumption is strengthened,—

(a) By the feeble and helpless mental and bodily condition of the testatrix and her entire incapacity to transact business :

(b) By the fact that the testatrix was taken, on the death of her husband, to the house of the legatee, and remained an inmate of his family, and under his exclusive control, to her death. She was never outside of the house but twice, during the whole time :

(c) By the absolute secrecy preserved in regard to the whole transaction.

It is not overcome by any proof that the testatrix ever spoke of making or having made a will.

## MOORE vs. MOORE.

IV. The most that can be claimed from any view of the evidence is that testatrix intended to *advance* to Alfred Moore, during her life, moneys to assist in building his house; and whether this should be treated as a gift or an advance will become a proper subject for inquiry on the final settlement of her estate.

C. W. SANDFORD, *for Executor.*

THE SURROGATE. The first question that arises in this case is, whether the will was executed in the mode prescribed by statute. All the witnesses testify to the subscription of the testatrix in their presence, and their attestation in her presence. One of them, Mr. Searle, on his direct examination said, that Mrs. Moore acknowledged it as her will, and requested the witnesses to attest it. On his cross-examination he stated that when he went into the room Alfred Moore and Mr. Sandford said they wished him to sign his name—the precise words used he did not recollect—no one else spoke to his knowledge—nothing more was said while he was in the room. He immediately qualified this statement, however, by adding “I did not hear any thing more. I don’t recollect Mrs. Moore saying much. I think she said it was her wish he should have that sum of money. If my memory serves me right, those were the words she used. I think I can be positive she said so. I have an indistinct recollection of what was said at that time. That is all I recollect hearing Mrs. Moore say while I was in the room. I am not able to say whether she said anything else or not. She addressed no remark to me, nor asked me any question nor gave me any direction. I am positive of that.” \* \* \* “I don’t recollect any thing else that was said or done while I was in the room. I can’t recollect whether the will was read while I was there. When I came in, the will was on the table.” He then testifies to the signature of the will, and proceeds: “We were all round the table—we could hear all that was said. \* \*

## MOORE vs. MOORE.

\* I don't recollect that Mrs. Moore said any thing to my wife while she was in the room. She might have asked her how she was. I don't recollect any thing more. Mrs. Moore made no request of my wife, nor gave her any directions." \* \* \* "The decedent made no request of Gen. Sandford while I was there, nor gave him any directions—not to my knowledge." \* \* \* "I never witnessed any other will besides this." On further examination Mr. Searle said, that before the will was signed it was read by Mr. Sandford, in his ordinary tone of voice, at the table where it was executed, and in the presence of all the parties. He also said, "I cannot tell either the words or the substance of what the decedent said when I was in the room. I do not recollect even the words or the substance of any thing she said. I could not tax my memory with a single observation. I am perfectly unable to state any thing she said. I recollect distinctly the fact that Gen. Sandford read the will. I do not now recollect the precise contents of the will. On looking at the will, I recollect that he read the attestation clause. I think that was before I signed it, but could not be certain." \* \* \* "I think decedent had not signed the will when Mr. Sandford read it." I don't recollect that she said any thing when he read it." \* \* \* "I am not aware that anybody spoke, after the will was read, before it was signed."

Mr. Searle's wife, one of the other attesting witnesses, states that she was present at the execution. She says, "I saw Mrs. Moore go to the table, and make her mark. I think so. I cannot be very sure—I did not take any notice. She said it was correct. I think I heard some part of the will read before I signed it. I cannot say what part—I do not understand these things. I did not take any notice. \* \* \* I think Mr. Sandford asked her, when she signed it, if it was satisfactory; and she said, Quite so, or to that purport." On cross-examination the witness said, "The decedent said nothing to me while I was in the room. She made no other remark except what I stated on my direct

## MOORE vs. MOORE.

examination—not that I recollect. I was near enough to hear.” \* \* \* “The only remark Gen. Sandford made to Mrs. Moore was, whether it was satisfactory, and she said, Yes. He made none to me or to my husband.” \* \* \* “Mrs. Moore said nothing about Alfred while I was in the room, when the will was executed.” \* \* \* “The day after the will was executed she said, ‘I hope I did not fatigue you coming down stairs last night.’ I answered, ‘Oh, no;’ and then she said, ‘Thank God! that’s over.’”

The will bears date November 7th, 1848, and these witnesses were examined three years afterwards. The instrument is very brief. The *testatum* clause is full and formal. Mrs. Searle thinks she heard some part of the will read before execution, while Mr. Searle states more positively his recollection that the whole was read, including the *testatum* clause. The reading of the instrument in the presence of the testator and the subscribing witnesses, and its subscription by all the parties in the presence of each other, is ordinarily sufficient evidence of a testamentary declaration, and of a request to the witnesses to attest the instrument. The minds of the parties meet on those two essential points, through the medium of the reading, and acquiescence or consent to the attestation. No particular form is requisite; all that the law requires is that the testator shall communicate to the witnesses that it is his will, and he desires them to attest it. This can be done by reading, and other acts performed by a third person, provided an intelligent assent on the part of the testator be shown. Indeed, not a word need of necessity be *said*. A deaf mute might go through all the ceremony, by means of a written communication. Besides, there is generally large room for inference, that the will has been duly executed, from the recitals of the *testatum* clause, where the transaction has not been recent. In the present case, taking in view the lapse of time, the inexperience of two of the witnesses in matters of this kind, the “treacherous memory” of one, if not of both of them, and the fact that the *testatum* clause of the will was read aloud

## MOORE vs. MOORE.

before it was subscribed by the testatrix and the witnesses, I think there is quite sufficient ground to admit it to probate. There are cases in which probate was allowed on proof far less satisfactory. (*Vide* cases cited in *Peebles vs. Case*, *ante*, p. 242.)

But in addition to the evidence I have examined, we have the testimony of the counsel who prepared the will, attended its execution, and became a subscribing witness. He states that he read the instrument to the decedent, and then requested Alfred Moore to send for two persons to witness it. He left the room, and returned saying Mr. and Mrs. Searle would attend; and they shortly after came in. He requested the decedent to sign the will, and she asked him to write her name. This was done, and she then made her mark in the presence of the witnesses. He says, "I then asked her if she published and declared this as her last will and testament, and wished us to subscribe it as witnesses. She said, Yes, and made some remark, I don't recollect precisely what. I then read the attestation clause, and the witnesses signed it in her presence." This evidence is explicit and positive, and removes any question as to the testamentary declaration and the request to the witnesses to attest the instrument. Thus, besides the reading of the *testatum* clause and the act of signing by all the parties in the presence of each other, here is precise testimony to a formal inquiry of the testatrix by the attending counsel, and the answer in the affirmative. The witnesses all agree that some part of the paper was read aloud; and if, in regard to other circumstances, Mr. and Mrs. Searle's recollection does not accord with that of Mr. Sandford, I think greater reliance may be placed on his statement of the transaction than on theirs. Their recollection was evidently indistinct as to what was said; they no more agree with each other on that point, than they do with him. But in regard to acts—the reading of a part of the will, the signatures, and that the testatrix said *something* in relation to the instrument, to Mr. Sandford—they all concur. I think the facts

## MOORE vs. MOORE.

and circumstances upon which they agree, sufficient to prove valid execution and justify sentence of probate; and this conclusion receives confirmation from the direct evidence of Mr. Sandford.

I next proceed to review the testimony in respect to the capacity of the decedent. She was an old lady, who had resided with her husband at his house in Batavia street until his death, June 23, 1848. Shortly after that occurrence she went to live with her son Alfred, at his residence in the Third Avenue, where the will was made in November, 1848. In April, 1849, she removed to a new house built by Alfred in Twenty-second street, where she remained until her decease.

Mrs. Conover, of Rahway, states that in the summer of 1846, she had frequent opportunities of seeing Mrs. Moore, who was then on a visit at the house of her son Joseph. She saw her daily, and says she was very childish—forgot who the witness was—did not know one of her grandsons—had her food cut for her—was never left alone.

Mrs. Trembly, of Rahway, was in the habit of seeing Mrs. Moore, some years before her decease, when visiting her son Joseph in the summer season. She considered her conversation like that of a child, though she did not recollect any thing said by her that was foolish. "She would imagine she saw things—think she would see some one coming, and would call Frances. She had her basket, with little rolls, and would lose some of them and would call Frances to look after them. \* \* \* When she imagined some one was coming out doors she would not be satisfied it was nobody, till Frances came and looked out. \* \* \* That was about four or five years ago." The witness last saw Mrs. Moore in May, 1848, at her house in Batavia street. She says, "She knew me when I came in; she inquired about Frances and her son Joseph. \* \* \* She was the same as she was before; she appeared to be a child in her conversation and actions." On cross-examination Mrs. Trembly, said that at this visit

## MOORE vs. MOORE.

she did not hear her say, or see her do, anything that was childish or foolish.

Eliza Dunham saw the decedent at Rahway, when visiting her son Joseph. She also called on her, with Mrs. Trembly, in May, 1848. She says, "She asked me my name three times over, when I was sitting at the table; she ought to have known me. \* \* \* She would take hold of her dress, and say it was pretty; it was not any thing fine. I recollect her saying she and her husband were poor. She had a basket, and would take a little roll up, undo it, roll it up and put it back again. She had her glasses in her hand, and would ask for them."

Mr. Zabriskie, the stepson of William Moore, was in the habit of seeing the decedent two or three times a week, in 1845, and subsequently to that period, three or four times a week. He says she talked in a childish manner, and was checked by her husband. He states that on the sixteenth of October, 1848, he and his stepfather visited Mrs. Moore at the house in the Third avenue; that William "shook hands with his mother, and she did not know him; she wanted to know who he was; he said he was her son William. Then I went in and shook hands with her, and she did not know me; William told her who I was; then we sat down on the sofa. Then she asked William where father was—when he would be back, and if we had seen him that day; and William told her, No; that father was dead. Mr. Moore had died June 22, previous. She said she could hardly believe it; but, as he said it, it must be so. Mrs. Alfred Moore was there at that time, and present at this conversation. She said that mother—Mrs. Moore—often asked about father; where he was; what had become of him, she did not see him." This witness called on Mrs. Moore afterwards, in 22d street, and states that she did not know him, but when she was told who he was, inquired and talked about his father and the members of his family.

Sarah O'Donnell visited the decedent in May, 1849, and says, "She bade me look at things in the yard—geese:

## MOORE vs. MOORE.

there were none there." She adds, that she saw her again in the succeeding August, when she did not know her; thought she had five sons; talked as if she were poor; imagined she saw a man on the floor.

John Carter lived in the same house with Mrs. Moore, in 1833 and 1834, for eighteen months, and called to see her two or three times afterwards. At a visit in 1846, he states that she appeared to be childish; did not know him; and it took her husband some time to make her understand who he was.

This is the substance of the testimony against the capacity of the decedent:

1st. Memory.—Mrs Conover states that, in 1846, she forgot who she was, and did not know one of her grandsons who came to make a visit at Rahway. 2. Mrs. Trembly says, that she knew her when she called at her house in 1846. 3. Mrs. Dunham testifies that, on the same occasion she did not know *her*, and asked her name several times; and that she asked for her spectacles, when she had them in her hands. 4. John Carter says, she did not know him in 1846; and 5. Sarah O'Donnell, that she did not know her in August, 1849. Mrs. Conover was an acquaintance of a few months, in 1846. Mrs. Moore had seen her grandson two months before; but how long a time had elapsed before that, since she had seen him, does not appear. Mrs. Trembly, whom she had only known when visiting at Rahway, was recognised by her in 1848, after a lapse of two years since they had met. Eliza Dunham whom she did not know in 1848, had seen her at Rahway in 1842 and 1846, half a dozen times on each occasion. John Carter had not seen her over two or three times, the dates of which are not fixed, since 1834. Mrs. O'Donnell never saw her but three times, prior to August, 1849. The decedent was about eighty-four years of age when she executed the will, and we are to look for some loss of mental activity and vigor at that advanced age. At that period, the memory, in respect to recent events and new acquaint-

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MOORE vs. MOORE.

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ances, receives but fugitive impressions. Even upon the evidence of the contestants, exclusive of the testimony of Mr. Zabriskie, I think it very far from being established that Mrs. Moore's memory, at the date of the will, was so feeble as to render her incapable of a testamentary act. Mr. Zabriskie testifies that, on the 16th of October, 1848, about three weeks before the execution of the will, she failed to recognise her son William, and did not remember that her husband was dead. If he has fixed that time correctly, it is the only single occasion before the will was made, in which her memory is shown to have failed in regard to her husband and her children.

2d. Childishness. This is a convenient phrase for questioning the mental vigor of aged persons, though perhaps it is the only mode of indicating a state of the mind peculiar to a certain period of life. It expresses, however, merely the opinion of the observers, and unless supported by facts, has weight only as an opinion worthy of more or less attention in proportion to the opportunities enjoyed for observation. No circumstances have been stated, showing unsoundness of understanding in the decedent; her turning over the rolls and work in her basket, and calling her dress pretty, are hardly substantial enough indications of imbecility, even were there no other proof in the case respecting her mental condition.

3d. Optical Delusion. Mrs. Trembly testifies that in 1846, two years before Mrs. Moore executed the will, whilst visiting her son at Rahway, she imagined she saw some person coming to the house, and would not be satisfied until her daughter-in-law, Frances, came and looked out. As I shall examine this subject further hereafter, it is sufficient at this point to say, that such delusion may exist in a sound state of mind.

On a review of the evidence for the contestants, then, the only important fact tending materially to an impeachment of the capacity of the testatrix, is that stated by Mr. Zabriskie. It undoubtedly shows a weak and failing mem-

## MOORE vs. MOORE.

ory; but the evidence of the other witnesses for the contestants, in connection with his own statement concerning conversations with Mrs. Moore, show that there was not an entire loss of memory. Mrs. Trembly, though a casual acquaintance formed at Rahway, was recognised by her in 1848, two years since she had seen her; and yet a few months afterwards Mr. Zabriskie states that she did not know her own son. If he states the time of this circumstance correctly, the case certainly calls for further proof; for although there may not have been absolute incapacity, yet the party propounding the will, should go further than evidence of mere formal execution. He should afford more light as to the state of the decedent's mental faculties, and should show that she acted with intelligence and comprehended the effect of what she was doing at the time of the *factum* of the will. Upon this point, quite a number of witnesses were examined, some of whom only occasionally visited the decedent, and others lived in the same house with her, in the habit of daily intercourse and conversation.

Mr. Searle, one of the subscribing witnesses says, he considered Mrs. Moore "perfectly sane and capable of carrying on and transacting any business." He never saw her transact any business, but she had lived in the same house with him over four months before the will was executed. He says, "I saw her daily, and spoke to her daily; I never knew her confined to her bed during that period; \* \* \* during that period I never perceived anything irrational or exhibiting a want of mind on her part. When the will was executed she was in about the same state of health as before. She continued to reside there till May, 1849; her health and habits continued about the same; I saw no difference. I was in the habit of calling in to see her and converse with her, almost every day." "Her memory appeared to be good." About a year after she removed from his house, he states, that he first observed any indications of her being irrational.

Mrs. Searle states, that the decedent's "mind was quite

## MOORE vs. MOORE.

good when she signed the will." "I saw her two or three times a day, sometimes; her health was very good at that time; I never knew her to be confined to her bed during the time she lived there. I never saw anything like insanity or derangement of mind, while she lived there. She has come up stairs and sat with me four hours or more; she conversed very freely and cheerfully. As far as I knew, her memory was good. She did not talk with me about her family very often. I had no reason in the least, to suppose there was any unsoundness of mind about her, during the period she lived at the house." Mr. Birch, who visited Mr. Searle, and became acquainted with the decedent whilst residing there, frequently had short interviews with her. He says, "Her conversation was always sensible," \* \* \* "there was nothing in \* \* \* her language, conduct or appearance, to indicate the least imbecility of mind." Mr. Cook, a brother-in-law of Alfred Moore, states that in the month of August, 1848, he stayed at the house in the Third avenue, about a week; he saw and conversed with the decedent daily, and observed "nothing peculiar in her appearance, manner or conversation." Mrs. Reeder, the wife of Mr. Moore's agent, and who lived next door to Mr. Moore's house in Batavia street, was in the habit of frequent intercourse with Mrs. Moore, to the time of her husband's death, and visited her when she lived with Alfred, once in the Third avenue and three times in Twenty-second street. On these occasions she always knew her "remarkably well." The visit at the house in the Third avenue, was in April, 1849, and lasted about two hours. At this and subsequent interviews, she says she found her perfectly sensible. She mentions several circumstances showing the state of her memory, which, she says, "appeared very good."

Ann Moore, an old lady residing with Alfred Moore, and the half sister of the husband of the decedent, lived with old Mr. Moore in Batavia street, for several years, till after her brother's death. She again lived with the decedent at

## MOORE vs. MOORE.

Alfred's house in Twenty-second street, from May 1849, till she died. She visited Mrs. Moore frequently in the Third avenue, sometimes spending a whole day with her. She states that her memory, while in the Third avenue, was "pretty good;" she "knew all her acquaintances;" and the first time she observed her memory to fail, was in the summer of 1849. The first she observed of the optical delusions, was when Mrs. Moore lived in Twenty-second street.

Dr. Wilsey, who had been taught by the decedent when a child, renewed his acquaintance with her in June, 1848, when he was called in to attend her husband in his last sickness. At that time and in the ensuing September, he saw and conversed with Mrs. Moore several times. On December 30, 1848, he commenced attending Alfred Moore's family, and made seven visits in January, 1849, four in February, six in March, three in each of the months of April, June, July and August. Eighteen visits were afterwards made at various intervals, until March 15, 1850, when he was requested by Alfred Moore to attend his mother, which he did till her death. As to the state of her mind in 1848, he says: "I did not perceive anything out of the way, as to her mind or recollection. \* \* I did not talk upon general events more than regarded relatives, and circumstances of early life. Her recollection in that respect was accurate; she had been a teacher at the period I first knew her; her conversation was entirely rational; I did not perceive or mistrust anything at that time." In respect to her mental condition in 1849, he says: "I perceived nothing peculiar in her mind or conversation. \* \* I never knew her to be sick at that time, and she was a woman of good constitution."

In November, 1850, the decedent was seized with a fit of apoplexy, from which, however, she partially recovered; and she lived until October, 1851. The Doctor states explicitly, that prior to March, 1850, he "did not mistrust any aberration of mind;" that from 15th March, to No-

## MOORE vs. MOORE.

vember succeeding, he "perceived some change of mind in very trifling particulars, \* \* \* occasionally a vacancy of mind; with the exception of that, her faculties seemed good. \* \* \* After the stupor in November, 1850, she imagined she saw objects which she did not see. She would not go to bed sometimes, saying there were people in bed. I can't recollect anything of the kind before. I think there was not. I feel pretty positive about it. The vacancy I discovered in March, 1850, was that she wanted to go to her house in Batavia street; she said, I want to go home; I asked, Where! She said, In Batavia street, where I live—this place does not look like home." "I perceived no indications of impaired or weakened intellect, or of what is called childishness, up to March, 1850. She was rather a dignified old lady."

Mr. Phinney became acquainted with Mrs. Moore, at the funeral of her husband; saw her once in three or four weeks from that time, till April, 1849; and then for about eleven months lived at Alfred Moore's house in Twenty-second street. He describes the decedent as conversing fluently and intelligently, and states, that he first observed a change in August or September, 1849. He says, "It was an optical illusion more than anything else; she saw a great many children, persons, horses and carts, where they were not. At the same time, if I told her they were not there, she appeared to be satisfied. Before that, I had, I should think, that kind of intercourse with her which would enable me to judge as to the soundness of her mind. Down to that period, I saw nothing to indicate unsoundness or aberration of mind. I wish to be understood, that when the optical illusions passed off, her mind was as clear as ever; they were only for a short time." \* \* "Her memory was good; I never saw any indications of absence of memory; she always recognised me. I never saw, before the optical illusions occurred, the least failure to recognise persons." Mrs. Phinney, the wife of this witness and

## MOORE vs. MOORE.

a consin of Alfred Moore's wife, lived in the same house, and was in the habit of daily intercourse with the decedent. She says, "When I first went to Twenty-second street, her mind was very good, her memory was good, her conversational powers were very good for the first few months. I could not say when I first observed any change in her, but I think as soon as in July. Her memory and sight began to be affected, &c." \* \* \* \* "I never knew her to fail to recognise any person before she had the difficulty in her sight, and then she recognised them when they spoke. \* \* \* I think I noticed no failure in her memory until this defect in sight came on."

Mr. Trowbridge, who formed an acquaintance with the decedent when visiting her son at the house in the Third avenue, and who saw her once in Twenty-second street, states that she always knew him and called him by name, and that he "perceived nothing like a failure of mind." Robert Reeder was agent for the decedent's husband fourteen years. He knew Mrs. Moore very well, and was in the habit of seeing and conversing with her frequently, while she lived in Batavia street. From the time she left there, he did not visit her until May, 1849, when he called at the house in Twenty-second street. She knew him then "perfectly well," and inquired about their old neighbors. He saw her again in the fall; had some conversation, and testifies that he observed no failure of "mind, memory or recollection," on any of these occasions.

Mrs. Blount was a pupil at the school of the decedent, in 1806, and visited her two or three times a year, some years ago. She saw her in the Third avenue but once, in the spring of 1849; and although they had not met for two or three years, was recognised by Mrs. Moore, who inquired after her mother and sister by name, conversed with her for some time, and stated that she was going to reside in Twenty-second street. Mrs. Blount subsequently called on Mrs. Moore, two or three times that summer, after she had moved to Twenty-second street. She states that she per-

## MOORE vs. MOORE.

ceived some "slight defect in memory, but none in intellect," at the interview in the Third avenue; "her mind was active, but her body otherwise;" that during the ensuing summer she observed "no change in her mind but in memory,—her memory failed, but nothing more than \* \* would be common in persons of her age,"—it was necessary to recall some circumstances to her mind, and then she would recollect them and "speak of them as freely and rationally as ever she did."

Mrs. Robertson, sister of Mrs. Blount, who had once been a pupil of the decedent, and had continued her acquaintance, visited her in company with her mother and sister, in October, 1849, and also a number of times subsequently. On the first occasion, she says, "It was the first time my mother had seen her since Mr. Moore's death.—She spoke of her husband very affectionately, and wished us to go up stairs and see his portrait, to see if my mother would recognise it. She followed us through the entry and tried to go up stairs, and could not; she fell in the entry and partially fainted; she came to; she was perfectly rational. \* \* I observed nothing like wandering of mind then; I never did; \* \* I never observed any wandering or deficiency of mind; I did observe a failure of memory."

Besides the opinions and circumstances thus given in evidence, there are some other facts tending to show the state of her mind. Dr. Wilsey states that she showed him some plants and told him the names of several of them; that he often saw her reading; she showed him passages in the Bible; and that she recollected previous conversations. Mrs. Searle saw her at work with her needle. Mr. Birch saw her reading. Mr. Cook says, in August, 1848, he found her reading a book and newspaper, and that in the morning she would take up "The Sun." Mrs. Reeder testifies that, to the death of her husband, she was in the habit of doing her own sewing, mending and washing.—

Mr. Phinney says that she was "in the habit of reading daily and almost constantly," in her hymn books and testament. Although not of active bodily habits, it appears that while she resided in the Third avenue, she was accustomed to go about the house, that she once visited an old friend at the Asylum for aged females, and also went to the Greenwood Cemetery. Indeed, I think the evidence abundantly shows that if before the decease of her husband she was so infirm in body and mind as the contestants insist, she subsequently recovered a larger degree of physical and mental vigor. There is a single instance of optical delusion testified to before her husband's decease; and, though many persons in the habit of constant and familiar intercourse with her have been examined, no similar occurrence is shown from that time until the summer of 1849, more than half a year after the will was executed. It is well known that such delusions may exist without the mind being affected—without derangement or mental hallucination. In cases of insanity, the delusion is in the mind, and the operation of the senses may at the same time be natural and accurate; but where the visual organ, or the nerve, or the brain, is so affected as to present to the mind appearances having no actual existence, the sense is at fault, and the disease may be indicated without necessarily being accompanied by mental derangement. The case of Nicolai, the celebrated bookseller of Berlin, who laid before the Philosophical Society an account of his sufferings from these spectral illusions, is an instance of this kind. Dr. Wilsey terms this malady in the case of the decedent, "a mental defect;" but I do not think he meant to be understood that it was insanity, for he also alludes to its physical character, in characterising it as "an affection of the brain," coming from "a pressure or congestion of the brain." As to her behavior when she supposed she saw these spectres, Ann Moore says, "I used to tell her she conceited she saw them; she said nothing." \* \*

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MOORE vs. MOORE.

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"I have taken her out of her chair to the place in the room where she thought she saw men—to satisfy her there was nobody there. When she returned she would think she saw them again, and I would keep on two or three times." Mr. Phinney says: "It was an optical illusion more than anything else; she saw a great many children, persons, horses and carts, where they were not. At the same time, if I told her they were not there, she appeared to be satisfied." \* \* \* \* "When the optical illusion passed off, her mind was as clear as ever." Whatever was the nature of this malady, the only symptom of it before the execution of the will, occurred in 1846, and there is no evidence of its appearance again until 1849, when it was indicated only occasionally.

On the whole, unless fraud, undue influence, or imposition be established, I do not think the will should be rejected. Alfred was one of the administrators of his father's estate, and, May 13, 1850, received a power of attorney from his mother. Before that, however, the real estate was sold, Mrs. Moore joining in the deeds with the knowledge of her sons, and the accounts were settled, she receiving one-third of the proceeds both of the real and personal property. In these accounts, she was debited with a large sum of money paid to her; and the balance on the settlement was paid over to her, and the whole matter closed with the privity of all the parties. It does not appear that in that important transaction her competency to act was ever questioned. Nor is there any proof that Alfred exerted any influence over her mind by any abuse of his position as administrator. We are left, therefore, to determine whether the facts, that the will was executed while she resided with him, that he is a beneficiary to a large amount, and gave the instructions for drawing the will, are sufficient to invalidate the instrument. These circumstances, in the case of an aged lady, certainly require vigilant examination, in order to see that the testatrix acted freely and with intelligence. Mr.

## MOORE vs. MOORE.

Sandford states, that prior to its execution the will was read to her. She was asked whether it was correct, and replied in the affirmative. The single important feature of the will is the legacy to Alfred, of ten thousand dollars, the remainder of her estate passing as if she had died intestate. It appears that this gift was designed to enable Alfred to build a house. Mr. Sandford states on this point as follows: "Mrs. Moore, when I read the will, said it was as she wished. She then inquired, if she gave Mr. Moore what she intended to give him to build the house, before she died, what the effect of the will would be. I answered that the effect would be to give him the amount twice over. She said she only intended to give him this money to build the house, and she supposed the ten thousand dollars would be enough; but I don't pretend to recollect the language." Again, "I understood Mrs. Moore the object of this legacy was to enable her son to build a house for himself. She stated that the money would probably be advanced to him shortly, and wished to know what the effect of that would be. I answered, the effect would be to give it to him twice over. To obviate that difficulty, I suggested this paper." The paper in question was then drawn by Mr. Sandford, and signed by Mrs. Moore making her mark. It directs "the executors of her husband's estate to pay to Alfred the amount of the purchase money of the lot lately purchased by him in Twenty-second street from Wm. Menzies, and also the sum he may expend in erecting a house thereon;" and that the "said sums should be charged to him," on the final settlement of her estate. The facts connected with the execution of this paper not only indicate some reflection on the part of Mrs. Moore, but point out the object of the bequest in question. The intention to make this gift, and the subsequent knowledge on her part of her act in that respect, are established by proof of her declarations at other times, both before and after the will was made.

Mrs. Searle says, "Mrs. Moore had spoken to me before

## MOORE vs. MOORE.

that time, about what she was going to do—about two months before, she spoke very frequently about it. She said that Alfred had always been a very good boy and very affectionate, and she meant to do something for him if she lived long enough to do it.” \* \* \* “Something she had been reading in the newspapers, about some child giving a parent trouble, brought up the subject. She said Alfred had always been a good and affectionate boy. I never heard her speak about her other children. I think I have seen one or two of the other sons at the house once or twice, but I had not much opportunity of seeing whether they came more frequently. The day after the will was made, she said, ‘Thank God! that is over.’ She asked me how I did—I said, ‘Very well.’ She said, ‘I hope I did not fatigue you coming down stairs last night.’ I answered, ‘Oh, no!’ and then she said, ‘Thank God! that’s over.’ She said to me three times, after the first conversation with her about Alfred, and before the will was made, that if she lived long enough, she meant to do something for him, but life was very short. I thought she meant life was very uncertain.” Mrs. Reeder testified that in April, 1849, Mrs. Moore informed her that she had given Alfred the money to build the house in Twenty-second street, “for him and his children when she would be in the grave.” Mr. Phinney states that the decedent spoke to him several times about having given Alfred the means to build the house in Twenty-second street. “She said, she gave him the money because she liked him better than the other boys.” Mr. Reeder says, “During the twelve months preceding Mr. Moore’s death, I heard her say several times, she would make Alfred a handsome present.” In the fall of 1849, when he called at the residence in Twenty-second street, Alfred Moore showed him the house, and the old lady asked Mr. Reeder what he thought of it. He adds, “I said it was a very nice house; and she said, ‘I gave my son Alfred this house.’ I replied, ‘That’s the present, then;’ and she laughed and

## BULKLEY vs. REDMOND.

said, 'That's the present.'” It thus appears that the will accords with the dispositions, affections, and intentions of the testatrix at other times expressed,—that she had previously designed some special provision for her son,—well understood and knew what she was about when she executed the will, and suggested a question as to the effect of the instrument in case she made the advance before her decease,—that she subsequently spoke of the testamentary act as if relieved that it was off her mind, and at several periods afterwards mentioned to friends that she had given the means for building the house. The evidence of capacity, volition and intelligence seems to me sufficient, after the most careful consideration I have been able to give the case; and I must therefore declare the will duly proved.

## BULKLEY vs. REDMOND.

*In the matter of the Estate of JOHN FLORENCE, deceased.*

WHERE a will was duly executed by the deceased and left in the possession of his counsel, and, a few months after, the testator sent for it, avowing the purpose of destroying it, and a day or two subsequently stated that he had destroyed it; *Held*, that although the facts raised a presumption that the will had been destroyed by the deceased, it was proper to examine his papers for the purpose of ascertaining whether the instrument had in fact been cancelled.

The fact that the decedent died intestate must be proved before letters of administration issue; and that is ordinarily shown by establishing that no will can be found.

A lost or destroyed will cannot be proved in the Surrogate's Court; but jurisdiction in such case belongs to the Supreme Court.

The grant of letters of administration does not preclude any party in interest from instituting proceedings in the Supreme Court to establish a will lost, or destroyed by accident or design; and on the will being proved there, the letters of administration will be revoked.

## BULKLEY vs. REDMOND.

The Revised Statutes permit the revocation of a will by its "destruction" by the testator, and do not require proof of the mode of destruction, when the instrument was last in the testator's possession and cannot be found.

Proof of the "injury or destruction" of the will, by two witnesses, is only required when the act has been performed by some other person, in the testator's presence and by his direction and consent.

When the will is last traced to the possession of the testator, and on his decease, after examination of his papers, and proper inquiry of the persons in his confidence and about his person during his last sickness, it cannot be found, the presumption is that it was destroyed by the testator, *animo revocandi*.

A will cannot be proved as a lost or destroyed will, unless it is shown to have been in existence at the death of the testator, or to have been fraudulently (or accidentally) destroyed in his lifetime.

ALBERT MATHEWS, for *Petitioner*.

JOHN ANTHON, for *Contestant*.

**THE SURROGATE.** The guardian of the infant children of the deceased John Florence having applied for letters of administration, Margaret Redmond intervenes, alleging that the deceased did not die intestate. On the proofs taken it appears, that Mr. Florence, about the middle of February, 1852, executed a will in the presence of two subscribing witnesses, and under the supervision of his counsel, who testifies to the fact of execution. On that, or the next day, he attempted his life. This instrument remained in the possession of his counsel until the end of May ensuing, when he sent for it, and it was given to him. He said he wished to destroy it. A day or two after that, he told his counsel that he had "destroyed" it, and requested him to destroy all memoranda relating to it, expressing the wish, "that under no circumstances should the contestant here receive any thing from him. He spoke very bitterly and feelingly." It appears that the party now intervening, who it seems was a legatee under that will, subsequently instituted certain legal proceedings against Mr. Florence; and on various occasions he expressed to his counsel the same views in respect to his wish that she should not receive any share

of his estate. Twice afterwards he directed a will to be prepared for him, and instruments ready for execution were transmitted to him by his counsel; but it does not appear that either of them was executed.

The statute relative to revocations of wills provides, that "no will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator and the fact of such injury or destruction, shall be proved by at least two witnesses." (2 *R. S.*, p. 64., § 35). This provision was somewhat varied from the language of the statute as it previously stood (1 *R. L.*, p. 365., § 3.), "so as to guard more effectually against fraud, and to render the section conformable in its terms to the construction it had received." (3 *R. S.*, 2d. ed., *Revisers' Notes*, p. 631.) The former statute recognized revocations "by burning, cancelling, tearing, or obliterating such last will and testament by the testator himself, or in his presence and by his direction and consent." No particular mode of establishing the cancellation was prescribed. The proof was left to abide the usual rules of evidence. The Revised Statutes changed the law, by permitting a revocation by the *destruction* of the instrument; and by demanding proof by two witnesses, when the cancellation was performed by another person by the direction of the testator, and in his presence. The word "destroyed" allows a larger scope to the testator, and does not call for precise proof of the mode of destruction, when the instrument cannot be found. It is obvious also that the provision as to the proof of "injur-

## BULKLEY VS. REDMOND.

ing or destruction, by two witnesses" was intended to be confined to the single class of cases where the testator did not perform the act himself.

In the present case, the execution and existence of a will some months prior to the decedent's death are proved. The instrument is traced to his possession, and that is the last heard of it, except his statement respecting its destruction. Supposing it well proved that, on due examination of his papers, and diligent inquiry of the persons in the confidence of the decedent and about his person during his last sickness, the will has not been found, what is the presumption of law as to the existence or destruction of the instrument? In the case of *Betts v. Jackson*, the will was executed in 1816, and left in the custody of the testator. In 1821, he made a codicil to it, and in 1822, requested another codicil to be drawn, which was not done, nor the will produced. Two weeks afterwards he died, and the will could not be found. The Supreme Court held that the presumption of law was in favor of the existence of the will, and the burden was on the party alleging its destruction or cancellation to show that fact. The subject was twice discussed in that court, and was then submitted to the appellate court, where it was unanimously determined that in such a case the legal presumption was that the testator had destroyed the will *animo revocandi*. (See 4 *Cowen*, 483; 9 *Cowen*, 208; 6 *Wendell*, 173.) The statute, however, comes in and adopts the rule prevailing at common law. By section 67 (2 *R. S.*, p. 67), it is expressly declared that no will "shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the life-time of the testator." I have not the slightest doubt, therefore, that when a will is shown to have been last in the possession of the decedent, and not to have been found after his decease on diligent examination, the law presumes it was de-

## BULKLEY vs. REDMOND.

stroyed by the decedent, *animo revocandi*. Indeed, the statute would justify a much broader proposition. This being the legal presumption, the *fact* of destruction is thus established, and the statute allows a will to be "destroyed," without prescribing or calling for proof of the particular mode, except in the single case when the act appears to have been performed by some person other than the testator. The naked fact that the will is not found, raises the presumption of revocation, and that presumption becomes conclusive, unless rebutted.

In addition to the non-production of the instrument in this case, we have the declaration of the decedent to his counsel, that he had destroyed it, and his request to have other wills prepared for him. Such declarations would of course have no weight, in the face of the instrument if produced uninjured. A revocation cannot be proved by parol declaration, in opposition to a valid will shown to exist. Such declaration can only be competent in connection with proof of an act of cancellation, or to repel or strengthen a presumption of cancellation. It may be material, to shew *quo animo* the act was done, or to elucidate facts and circumstances bearing upon the question of cancellation. As the matter now stands, I think there is not only a failure of proof of an existing will at the testator's death, but, on the contrary, a presumption that the will executed in February, 1852, was destroyed by the decedent. I am not satisfied, however, that a proper search has been made among the papers of the decedent for the instrument, and must therefore direct the appearance of the widow, and the parties who have had the custody of his papers, in order that I may make further inquiries. ●

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BULKLEY vs. REDMOND.

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*In the same matter.*

FEBRUARY 15.

It having now been established that no will has been found existing at the decedent's death, after a proper search, I think that the grant of administration should be made. A lost or destroyed will cannot be proved in this court, and the Surrogate's jurisdiction in such a case extends only to such inquiries as necessarily appertain to the determination of intestacy, which question must always be passed upon before granting administration. The fact that the decedent died intestate must be proved, before letters of administration issue, and that fact is ordinarily shown by proving that no will can be found. Such a determination, however, does not preclude any party in interest from instituting proceedings in the Supreme Court, in order to establish a will lost or destroyed by accident or design. (2 R. S., 4th Ed., p. 253., § 63.) If such an instrument should be proved in that court, the letters of administration will be revoked as a matter of course. (2 R. S., 4th Ed., p. 263., § 46.) Indeed, the statute has contemplated the case of a grant of administration at the very time an application to prove a lost or destroyed will may be pending in the Supreme Court; and instead of declaring the grant void, or restraining the Surrogate from issuing letters during the pendency of such a suit, it merely authorises the Court to restrain the administrator from any acts or proceedings that might be injurious to the parties claiming under the lost or destroyed will. (2 R. S., p. 254., § 65.) I see no reason, therefore, for delaying administration any further in the present case. If a suit be instituted to prove the will alleged to be lost or destroyed, abundant remedy exists for the protection of the rights of all persons concerned.

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EITEL vs. WALTER.

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## EITEL vs. WALTER.

*In the matter of the estate of JOHN WALTER, deceased.*

THE intestate's wife left his residence, taking their child with her, and for seven years resided with her parents, in Pennsylvania. After her death, the husband of the child's maternal aunt brought her to New York and took her to reside with him, where she continued for five years, until the decease of her father, without any demand being made on the father to assume the care of his daughter, or to pay for her support. *Held*, that there was no legal obligation on the intestate to compensate the uncle for the support of the child during the period in question, and a claim against the estate of the deceased for necessities furnished, was accordingly rejected.

THERRASSON & BRYAN, *for Petitioner.*

STILLWELL & SWAIN, *for Administratrix.*

THE SURREGATE. The intestate died 4th of August, 1849, and on the 16th of that month administration was granted to his widow. In April, 1851, John N. Eitel presented a petition setting forth that he had been appointed guardian of Catherine Walter, minor child of the intestate, on the 3rd of September, 1849, but that the administratrix did not recognize his ward as the daughter of the intestate; and he prayed for an account of the estate. The answer of the administratrix denied the legitimacy of Catherine; and on the issue thus raised, and the proofs taken, I found that she was the lawful child of the deceased. A demand has now been presented against the estate by Mr. Eitel, claiming in his own right as creditor of John Walter compensation for the support and maintenance of Catherine, during her father's life-time. It appears that in October, 1835, the intestate married Elizabeth Herman, and the child Catherine was born in June, 1836. In the fall ensuing, his wife left his residence in this city, taking their child with her, and went to Easton, where she remained with her parents. She returned, and again lived with her

## EITEL vs. WALTER.

husband a few months in the summer of 1837, and then finally departed, and from that time continued to reside with her parents at Easton until her death, in the year 1844. In January, 1841, the intestate procured a decree of divorce, in the Court of Chancery of this State, by which the marriage was dissolved; he was permitted to marry again, and was to have the "custody, care, maintenance and education of Catherine" his infant daughter. On Mrs. Walter's death, in 1844, Mr. Eitel, the husband of the maternal aunt of Catherine, brought her from Easton to New York, and took her into his family, where she resided with him until the decease of her father. Meanwhile, after his divorce Mr. Walter married again, and continued to live in this city. It is admitted that he never requested Eitel to take charge of the child, and that Eitel never made any demand of the father to provide for her. Indeed, it does not appear that Walter knew his child was living with her uncle, until the spring of 1849, a short time before his death, when he mentioned the fact to one of his friends.

There is evidence in the case, of disagreement between Mr. and Mrs. Walter, and of harsh treatment on his part; but when she last left his house, it appears that he accompanied her to the cars, taking her in his own conveyance, and furnished her with money for her expenses. Whether she left him, to reside with her parents, by mutual consent, or whether she was compelled to go, is difficult to determine, nor do I think it important. She lived away from him many years, and it does not appear that before or after the divorce, either she or her parents made any claim on Catherine's father for her support, or undertook in any way to compel him to perform his natural obligation in that respect. The law on the subject of the liability of the father for necessities furnished his child, has been laid down with some rigor in the English cases. It is conceded on all hands that he is not liable unless on

## EITEL vs. WALTER.

some *contract* express or implied. The only point open for discussion is, when the law will *imply* a contract. Whether desertion or neglect forms a foundation of an implied contract is, to say the least, doubtful according to the English decisions. (3 *Stephens, N. P.*, 2051. *Chitty on Contracts*, 146. *Urmston vs. Newcomen*, 4 *Ad. & El.*, 899. *Story on Contracts*, § 79. 2 *Kent's Com.*, 5th Ed., 192. *Mortimore vs. Wright*, 6 *Mees & Wells*, 482. *Seaborne vs. Maddy*, 9 *C. & P.*, 497. *Hodges vs. Hodges, Peake's Ad. Cas.*, 79.) I think a more humane doctrine prevails here, and that the father is held liable for necessities, or, in other words, the law will imply a contract on his part, if he refuses or neglects to perform his natural duty to his offspring. (*Van Valkinburgh vs. Watson*, 13 *J. R.*, 480.) What facts, however, are sufficient to establish such neglect must depend upon the circumstances of each particular case. It does not appear in the present instance, that the father ever refused to provide for his child. She was taken away by her mother, and lived with her, at the residence of her grandparents in another State, for seven years, without any claim ever advanced against her father either to take her back to his own home, or to provide for her support elsewhere. On her mother's decease she was brought back to the city where her father resided, and taken by her uncle and aunt into their family, and there retained for five years longer, without the slightest indication on the part of Mr. Eitel, that he looked to Walter for her support. I do not think the law will imply a contract under such circumstances. If Mr. Eitel had given the father notice to maintain his child, and he had refused, the case would have been widely different. A father has a right to provide for his child at his own home; and though, in conversation with a friend, Walter said he did not want the child, there is not the slightest ground for presuming that he would have refused to take her back, had Eitel requested him. Indeed,

## EITEL vs. WALTER.

it is a fair presumption from the circumstances, that the uncle and aunt preferred to have the child with them; and in view of the relationship existing, the natural inference would be that they maintained her without expectation of reward. (*Williams vs. Hutchinson*, 3 Coms. R., 312. *Robinson vs. Cushman*, 2 Denio, 149.) The conduct of Eitel repels the idea that he acted under the supposition of any contract, express or implied, between him and the father. He made no claim for five years, and the demand first springs into existence three years after Walter's death, although Eitel was appointed guardian in September, 1849. If he did not design to bring up his wife's niece as one of his own family, and maintain her out of his own means, he should at least have given Walter notice, instead of lying by until long after his death. In the absence of notice, the father had a right to infer that Catherine was supported, in the family of her aunt, from motives of affection and natural feeling. There may be cases where such notice cannot be given, growing out of the pressing nature of the services rendered; but here there was ample time to put the parent upon his election, to take his daughter home or meet a claim for her maintenance elsewhere. Failing to adopt this course, Eitel must be presumed to have intended to provide for his niece himself; and in that case there was no implied contract between him and the father. I am of opinion, for these reasons, that the claim should be rejected.

## GLOVER vs. HOLLEY.

## GLOVER vs. HOLLEY.

*In the matter of the Estate of JOHN G. GLOVER, deceased.*

TRUSTEES created by a last will and testament, or appointed by any competent authority to execute a trust created by will, or executors, or administrators with the will annexed, authorized to execute such a trust, may, from time to time, render their accounts, and have the same finally settled before the Surrogate.

Such final settlement may be made at their own instance, and though they have not been cited to account by parties interested.

There may be final accounts from time to time, as occasion may require. The *finality* intended by the term final settlement refers to the conclusive character of the accounting, which being made on citation to all parties in interest, is a final and conclusive adjustment up to that period. If assets are afterwards realized, or there are continuing trusts, there may be subsequent accountings in respect to those matters.

Executors may be allowed for their expenses in the management of the estate, but the charges must be reasonable. If necessary, an agent may be employed at the cost of the estate.

M. S. BIDWELL for *Executor*.

MURRAY HOFFMAN, for *Legatees*.

THE SURROGATE. John Glover, the sole surviving executor of the last will and testament of John G. Glover, deceased, applies for the adjustment and settlement of his accounts, under the provisions of the act of 1850, amending *Section 66, Title 3, Ch. 6, Pt. 2, of the Revised Statutes.* (2 R. S., p. 94.) By the original terms of that section, it was declared that section 65 should not extend to any case where an executor is liable to account to a court of equity, by reason of any trust expressly created by any last will or testament. *Section 65* relates only to the effect of a decree of final settlement of the account of an executor or administrator, declaring that, as to all parties in interest duly cited, the settlement shall be deemed conclusive evidence of certain facts enumerated in that section. I do

not understand section 66 to have been designed to limit the right of an executor so that he could not have a final settlement of his account when it involved an express trust, but only to modify the usual effect of such a final settlement by declaring that, in cases of express trust, it should not be conclusive evidence of certain facts, as provided in the 65th section. Whether executors clothed with a testamentary trust might not avail themselves of the general provisions of the statute relative to the final settlement of an executor's accounts, is not, however, a question necessary to be discussed, since any doubt that might have existed on that point has been removed by the act of 1850. By the terms of that law any trustee created by any last will or testament, or appointed by any competent authority to execute any trust created by will, or any executor, or administrator with the will annexed, authorized to execute such trust, may, from time to time, render and finally settle his accounts before the Surrogate, in the manner provided for the final settlement of the accounts of executors and administrators.

Now, by law, executors may have a final settlement of their accounts at their own instance, and though not cited by persons interested, and this privilege is therefore extended to testamentary trustees.

It is objected, however, that the executor in a suit instituted in the Court of Chancery in the year 1839, accounted for his management of the estate, that the shares of the different legatees were apportioned, and that the accounts now sought to be settled appertain only to certain shares held by the executor in trust. It is argued, therefore, that there cannot now be a final account, that such an account cannot be had during the continuance of the trust, but only at its termination. This objection is based on a misconception of the term *final* settlement. The *finality* intended by this expression refers to the conclusive and binding force and obligation of the settlement on all per-

## GLOVER vs. HOLLEY.

sons cited pursuant to the statute, in contradistinction to the accounting at the instance of a creditor, legatee or distributee. A final account may be had whenever there is anything to account for, so that whenever, after any final settlement, other assets come into the executor's hands he may, as to them, have a final settlement, and so, *toties quoties*, as occasion may require. This idea is contained in the very act under which the present proceeding is instituted. It authorizes the testamentary trustee, "*from time to time*," to "render and *finally* settle his accounts," thus plainly implying there may be more than *one* final settlement. The propriety of permitting accounts to be adjusted in this manner, from time to time, in cases of trusts running through a long series of years, is obvious, and by the letter of the statute the Surrogate is expressly clothed with the jurisdiction.

It is further insisted that an account may be had in the suit commenced in the late Court of Chancery, and now claimed to be pending in the Supreme Court. The decree entered in that cause January 30, 1845, was a final decree ; and relief asked by the bill of complaint can be obtained no further than the decree permits. Whether on the footing of that decree the surviving executor may not have his trust accounts settled in the Supreme Court, on an application by petition or complaint for that purpose, is not, I think, material to be determined when no such application has been made. The accounting of the executor was ordered and had in the original suit, all the assets in condition to be distributed were divided, and the shares of the daughters set apart pursuant to the trusts specified in the will. A receiver was appointed of all the estate, to act in conjunction with the executor, and on his decease it was directed, by an order of May 5, 1851, that a new receiver should be appointed in his stead. By that order, an account was also directed to be taken of the *residue* of the estate not before distributed ; but I do not see that any

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GLOVER vs. HOLLEY.

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proceedings have been instituted for the purpose of adjusting the accounts of the executor relative to the shares set apart in trust for the daughters of the testator. That being the case, there appears to me to be no sufficient reason why I should decline the jurisdiction now invoked by the executor.

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*In the same matter.*

The parties in interest object to a charge made by the executor, of \$600 per annum, paid to Glover and Holley for office rent, and assistance rendered by them in the management of the estate. It has been proved that the amount in question has been actually disbursed by the executor, but the propriety of the disbursement is controverted. The statute permits an allowance to executors for their expenses, but the charges must be reasonable. It appears that the executor resides at a distance from the business part of the city,—the estate is large, and the trust a continuing trust, requiring the keeping of books of account, the investment of moneys, the receipt and payment of income from time to time, and other details necessarily growing out of business of this nature, and calling for daily attention. The evidence given on these points has relieved much of the doubt I entertained, on the coming in of the account, as to the propriety of employing an agent. (*In the matter of Livingston*, 9 Paige, 440.) I am therefore of opinion that an allowance should be made for the purpose in question, but must reduce the amount to the sum of three hundred dollars per annum for the services of agents, and office rent.

## HUTCHINGS vs. COCHRANE.

## HUTCHINGS vs. COCHRANE.

*In the matter of proving the Will of EMMA J. COCHRANE.*

WHERE a will, prepared by the counsel of the decedent, pursuant to her directions, was handed to her by one of the subscribing witnesses, who stated that he came "to witness her signing her will" and the testatrix, having read it, declared it to be her will, signed it, and both witnesses subscribed their names in her presence,—*Held*, that there was sufficient evidence of a request to the witnesses to attest the instrument.

A request to sign as witnesses may be communicated by signs, or may be implied from the acts of the parties.

When all the circumstances show the design of the testator to execute his will, his knowledge of the character of the instrument, and the purpose for which the witnesses attend, his signing the instrument, and acknowledging it to be his will, his observing the witnesses sign, and then taking the executed paper into his own possession without objection or comment, sufficiently establish and imply a request to the attesting witnesses to join in the necessary formalities.

A will, contested for alleged want of capacity, and for undue influence, admitted to probate.

WILLIAM INGLIS, for Executor.

The instrument propounded was executed and attested according to the statute.

1st. Both the attesting witnesses swear that she subscribed it in their presence, and that she acknowledged it, at that time, as her last will, and that they signed it as witnesses in her presence, and that of each other.

2d. The other requisite, that the attestation of the witnesses should be made *at the request of the testatrix*, was *substantially complied with*.

There is no particular form or manner in or by which it is requisite that the request of the testatrix should be made. The request may be verbal or by signs; it may

## HUTCHINGS vs. COCHRANE.

come from the witness to the testatrix, and will be sufficient if assented to by her.

In this case, Emma J. Cochrane knew the purpose for which the witnesses, William H. Sparks and George C. Barrett, were in attendance on her. Mr. Sparks states: "I asked her if it was her last will and testament: she said, Yes. I signed it. The other witness was George C. Barrett. He was present when she declared it her will. Both signed as witnesses in her presence, and at the table where she was sitting. I think I told her after she opened the envelope that I wanted her to swear to a paper, *and to witness her sign her will. I think I told her that it was necessary to have two witnesses.*"

The testatrix had previously to this, at the same interview, read the will, as both the witnesses testify, to which there is the usual attestation clause, a fact well known to the witness, George C. Barrett, who had copied it.

The circumstances amounted to a request, by the testatrix, for Sparks and Barrett to be witnesses. She was told the purpose for which they came, she read the formal attestation, she was told that two witnesses were necessary, she signed and published the instrument as her will, and they signed it as witnesses in her presence. Could a request be stronger, unless the Surrogate should be of opinion that a testatrix should convey her wish to the bystanders that they should attest, in the very phraseology of the statute, in *hæc verba*, and say, "I request you to be witnesses to the signing and publishing of this my last will and testament."

In the case of *Doe vs. Roe* (2 *Barbour's Supreme Court Rep.*, 201), circumstances similar, and not perhaps so strong, were considered sufficient evidence of a request by the testator that the witnesses should sign.

I would submit with confidence, to the consideration of the Surrogate, the proposition that if a testator subscribes a paper, and at the same time declares it to be

## HUTCHINGS vs. COCHRANE.

his last will and testament, to two bystanders, who thereupon in his presence subscribe their names as witnesses, a request to such persons to become witnesses, is to be implied from the circumstances *per se*. In this case the circumstances implying a request are much stronger than in the case last stated.

But even if the witnesses, Sparks and Barrett, had forgotten everything in relation to the accompanying circumstances, if they had not remembered that the testatrix signed the paper, and declared it to be her last will and testament, yet the fact of their subscription of the paper as witnesses to an attestation clause, as full as that in the present case, would have been sufficient to prove the proper execution and declaration of the instrument as a will, unless testimony appeared showing, affirmatively, that the statutory provisions had not been complied with.

This is the view taken by Chancellor Walworth, in the case of *Brinckerhoof vs. Remsen*, in 8 *Paige's Rep.*, 488. He observes, "*Where the subscribing witnesses to a will have subscribed their names at the end of an attestation clause, showing that all the formalities requisite to a valid execution of the will were complied with, the mere inability of the witnesses to recollect that the testator published the instrument as his will, is not sufficient to invalidate the same, unless the witnesses recollect that he did not declare it to be his will, and that the attestation clause was not read and understood, at the time of the execution of the instrument.*"

In the same case on appeal (26 *Wendell*, 325), Chief Justice Nelson observes, "No form of words will be necessary. The legislature only meant that there should be some communication to the witnesses, indicating that the testator intended to give effect to the paper as his will. Any communication of this idea, or to this effect, will meet the object of the statute. *I agree also that the mere want of recollection of the witnesses that the testator indicated*

## HUTCHINGS vs. COCHRANE.

*the instrument to be his will, after signing the attestation clause, ought not to be evidence per se of non-compliance with the statute. After that there should be something like affirmative proof of the want of publication."*

The Surrogate will remember that the controversies, in relation to the execution of wills under the statute of 1830, have arisen almost entirely in regard to the declaration required to be made to the witnesses that the paper subscribed or acknowledged is the testator's last will and testament.

The statute goes upon the idea that there should be no chance given to have a paper propounded, as a last will and testament, which the person executing it might have signed thinking it to be a paper of a different character. After subscription and a declaration by the testator to witnesses that the paper subscribed was his last will and testament, there could be no fraud or misconception in relation to the request to attest.

3d. At the time of the execution of the paper propounded, the testatrix, Emma J. Cochrane, was of sound disposing memory and understanding. It is unnecessary to allude particularly to the testimony of the Rev. Dr. Knox, of William C. Barrett, and Dr. Hosack, persons better qualified to judge on this point than any one produced on the part of the contestants, excepting the Rev. Mr. MacDonald, who allows that he had not conversation enough with her to judge. The weight of testimony is that her intellect was of an order rather superior to that of persons of her condition. *The witnesses impeaching it seem to have considered certain peculiarities of manner, such as taciturnity and a certain shyness, arising from bad health, as affecting the quality of her intellect.*

The Counsel for the contestants, however, gave up this

## HUTCHINGS vs. COCHRANE.

point of alleged imbecility, by express admission to the contrary.

4th. The testatrix was under no undue influence, either of Mrs. Thomson, the principal legatee, or any other person.

She was displeased with her brothers and sisters, for reasons well or ill founded. If those reasons were ill founded, it is unfortunate for the next of kin, but they were not of such a nature as to show any mental hallucination. She had formed her resolution to make a disposition of her property out of her own family, and she adhered to it notwithstanding all remonstrances, even from those who testify to her entire sanity, and who are supposed by the contestants to be adverse to them. The schedules Nos. 1 and 2, signed by her, show at once her determination and the clearness of her views.

As to the appointing a stranger, Mr. Hutchings, her executor, there is no argument in favor of the existence of undue influence to be deduced from that circumstance. He used to collect bills for medical attendance on her family, and she had probably heard of his character, and he was, besides, recommended by Dr. Hosack. It required as executor a man of business habits to manage her estate properly, through the difficulties that probably would beset it, judging from her former experience with her relatives, which office her friend Dr. Hosack would naturally decline, and for which the residuary legatee was but ill fitted.

As respects one of the contestants, Anna, whose peculiar situation would probably have most appealed to the feelings of the deceased, I would observe, that the instrument propounded gives to her what would probably be nearly equal to her distributive share of the property of the deceased, if there had been an intestacy, after the debts are paid.

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HUTCHINGS vs. COCHRANE.

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For the reasons above stated it is submitted that the instrument propounded should be admitted to probate.

L. R. MARSH, *for Contestants.*

THE SURROGATE. The probate of this will is contested by the sister and brothers of the deceased, on the grounds of informal execution, weakness of capacity, and undue influence.

The will was prepared by Mr. Barrett, by the direction of the decedent, and, when engrossed, was transmitted to her for execution, by the hands of Mr. Sparks and Mr. Barrett's nephew, who attended at Miss Cochrane's residence for the purpose of becoming attesting witnesses. Mr. Sparks states that the instrument was enclosed in an envelope—was first handed her to read—she opened and read it. He then asked her if she understood the contents, and she replied in the affirmative. He requested her to sign it, and when she had done so, asked her "if that was her signature for the purpose?" and if "that was her last will and testament?" "She said, Yes;" and the witness then signed his name, in the presence of Miss Cochrane, and at the table by which she was sitting. He further testified, that Miss Cochrane did not, to his recollection, ask him to become a witness, and he did not ask her whether he should. He says, however, "When I came there, I think I told her, after she had opened the envelope, that I came there to take an affidavit, and to witness her signing her will, or to take an acknowledgment that that was her will, or words to that import. I said nothing about George, why he came. I don't think George said anything to her, or she to him. After I stated what I came for, she first sat down, signed and swore to the affidavit, and then took up the will and read it; and after that the will was executed, as I have stated before. I think I told her it was necessary

## HUTCHINGS vs. COCHRANE.

to have two witnesses. I don't know that she said any thing to that."

George C. Barrett, the other witness, a lad between 14 and 15 years of age, proves the signature of the testatrix; Mr. Sparks' inquiry if she acknowledged the instrument to be her last will and testament; her answer thereto, by nodding her head, or saying yes; and the subscription of the witnesses in her presence. He says, "I think that after she signed and Mr. Sparks signed, I put my name, without her asking me, or I asking her, as if it was taken for granted. \* \* \* I don't remember that anything was said regarding the necessary number of witnesses." The will was engrossed by this witness, and the name of Mrs. Thomson having been left blank in consequence of uncertainty as to the mode of spelling it, he filled the blank at the time of execution, on ascertaining from Miss Cochrane how the name should be inserted. It appears from this proof, that there was full knowledge, on the part of the testatrix and the witnesses, as to the character of the transaction then performed. She read the instrument, had a blank filled in, signed it, replied in the affirmative to the question of Mr. Sparks, whether she acknowledged it to be her last will and testament, saw the witnesses attest it, and then took the paper into her own custody. Besides all this, Mr. Sparks thinks, when he first saw her and handed her the envelope, after she had opened it, he told her he had come to witness her will, or take the acknowledgment of her will. He thinks also that he told her it was necessary to have two witnesses. There is no proof that Miss Cochrane expressly requested the witnesses to attest the instrument, or that they expressly asked her whether they should become witnesses. The evidence is, in fact, the other way. There was no formal express request. But is it necessary the request required by the statute, should be made by word of mouth. Certainly not; the letter of the statute does not define the mode in which the request must

## HUTCHINGS vs. COCHRANE.

be made. It may be communicated by signs, or may be implied from the acts of the parties. When all the circumstances show the design of the testator to execute his will, his knowledge of the character of the instrument, and the purpose for which the witnesses attend, I am clearly of opinion that his signing the instrument, and acknowledging it to be his will, observing the witnesses sign, and then taking the executed paper into his own possession, without objection or comment, sufficiently establish and imply a request to the attesting witnesses to join in the necessary formalities. The request is contained in the present sanction then given to the act, by the conduct of the testator in signing and making the testamentary declaration, and in the recognition of the attestation, not only by acquiescence, but by taking custody of the paper after execution. Any other construction would be narrow, unreasonably literal and technical, and utterly repugnant to that good sense by which the conduct and actions of men should be judged and interpreted. I think, therefore, that the proof of execution in this case is sufficient.

As to the capacity of the decedent, it is not contended that she was wholly incompetent, and I do not deem it necessary to discuss the proofs bearing on that point. I feel bound, however, to express the opinion that she was abundantly competent to dispose of her property by will; and a large part of the evidence in the way of opinions unfavorable to the vigor and maturity of her intellect, may very naturally be attributed to her modest, retiring habit, simplicity of character, diffident and taciturn disposition—qualities likely to be fostered by chronic ailments, and the disease to which she ultimately fell a victim. We hardly look for great strength of intellect in a young, delicate and inexperienced girl. The law does not nicely measure grades of mental vigor, nor brand as incapable one who does not possess a certain degree of talent. The decedent's mind was sound. There was no derangement, aberration or delu-

sion. She had some education, could read, write, play on the piano; and, in the judgment of such men as her counsel Mr. Barrett, the Rev. Dr. Knox her pastor, and Dr. Hosack her physician, to whom she appears to have opened her mind freely, she was intelligent and perfectly rational.

In regard to undue influence, I find no evidence in the case pointing to such a conclusion; but it is urged that an inference of that kind is to be drawn from the tenor of the will, as compared with a previous will, and from other circumstances thought to be suspicious. It appears that the decedent came to the determination to leave her property, which was quite moderate in amount, to the lady with whom she had boarded. That she was brought to this result by the suggestion, persuasion or interference of any person whomsoever, is not only without a particle of proof, but is rather negatived by the evidence of Dr. Hosack and Mr. Barrett. She gave as reasons for her determination, the kindness of the intended beneficiary, and the unkindness of her relatives. It can serve no good purpose to inquire into the origin or extent of these family differences; for even if I should judge the feelings of the decedent on this point utterly unfounded, which, however, I am far from saying, it would be entirely unwarrantable to assert that her mind had been poisoned by designing and interested persons. To sustain that idea there is no evidence, and fraud is not to be presumed on mere surmise and conjectures. It is obvious from Mr. Barrett's statements, that the will was made, not only on due deliberation, but after the fullest consultation with her legal adviser, and very decided efforts on his part to persuade her to a different disposition. These efforts were resisted, the subject was canvassed, and she remained of the same mind. Testamentary capacity conceded, every one is the judge of his own acts in respect to his testament; and where the instrument appears to have been executed after ample consideration, and in accordance

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CHURCHILL vs. PRESCOTT.

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with the expressed affections of the testator, it would be a very wanton exercise of power to attempt disturbing such a disposition, except upon clear evidence of fraud or imposition. I am perfectly satisfied that the will expresses the intentions of the decedent, and conforms to her real dispositions and affections ; that she was abundantly competent to dispose of her property ; and that the instrument propounded has been proved to have been duly executed as her last will and testament. It is admitted to probate accordingly.

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## CHURCHILL vs. PRESCOTT.

*In the matter of the estate of JAMES L. PRESCOTT.*

THE statute not only prescribes the order of preference between the next of kin, in relation to the grant of administration, but also declares the rule of competency. Indebtedness to the estate does not render a person incompetent to administer, nor impair his priority of right to administration.

THE SURROGATE. The husband of a sister of the intestate having applied for administration, on the return of the citation the intestate's brother appeared, and claimed priority of right to administer. The claim was contested, on the ground that the brother was indebted to the intestate at the time of his decease, and is thereby incompetent to administer.

The statute not only prescribes the order of preference between the next of kin, in relation to the grant of administration, but also declares the rule of competency. Indebtedness to the estate, is not one of the circumstances specified in the statute as rendering a party incompetent.

Where several applicants are equally entitled, such a fact may be taken into consideration by the Surrogate, in deciding between them. But a preference to administer, given by statute, can only be overcome by the rule of incompetency as declared by statute. So far is the indebtedness of the executor from being a sufficient reason for refusing the grant of letters, that provision is expressly made for the inclusion in the inventory of the debts due by the executor to the testator. (2 *R. S.*, *p.* 84, § 14.) It is evident, therefore, that the subject was not left unconsidered in the case of an executor, and there is no reason to suppose that there was in this respect any oversight in regard to an administrator. If there were, the remedy must be legislative, and not judicial. The letters must, therefore, be granted to the party entitled to a priority under the statute.

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GOODALL vs. McLEAN.

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## GOODALL vs. McLEAN.

*In the matter of the estate of JOHN HYER, deceased.*

Where the will contained the following clause, "Upon the death of either of my sons John or George, without lawful issue, the one-fourth part of the devises and bequests made to him in this my will shall go to his wife, if she shall then be living, and the other three fourths of the same shall be divided, share and share alike, among my surviving children and the legal heirs of those who may be deceased;" and the testator's son John died without issue, before the testator, leaving his wife, "then living;" and she survived the testator,—*Held*, that John's widow was entitled to one fourth of all the devises and bequests made to John. The condition that the widow of John shall "then be living," refers to the time of John's death, and not to the time of distribution.

A clause of substitution is generally referable to the death of the testator.

Where the devise or bequest is to the donee by name, with a gift over in case of death, if the event happen in the testator's life-time the ulterior gift takes effect immediately on the testator's decease.

THE EXECUTOR, *in person*.

S. P. HUFF AND A. UNDERHILL, *for Legatees*.

THE SURROGATE. The testator devised and bequeathed to his wife, for life, one third of the rents, issues, and profits, of his real and personal estate, and the remaining two thirds, after certain deductions, he gave equally between his "sons and daughters, and the issue of such of them as may die leaving lawful issue, such issue to take the share the parent would have taken if living." On the death of his wife, and the majority of his youngest child, he directed the sale of his estate, and the distribution of the proceeds, as follows: "The proceeds of such sale shall be equally divided for the benefit of all my children, and the issue of such of them that may die leaving lawful issue; such issue to take the share or interest which the parent

## GOODALL vs. M'LEAN.

would have taken." After various other provisions, the following clause occurs: "Upon the death of either of my sons John or George, without lawful issue, the one-fourth part of the devises and bequests made to him in this my will, shall go to his wife, if she shall then be living, and the other three fourths of the same shall be divided share and share alike among my surviving children, and the legal heirs of those who may be deceased. I do further order and direct, that in case of the death of either of my daughters without issue, their respective husbands, if living, shall have the one-fourth of what is in this my will given to them, and the remainder of the same shall be divided share and share alike among my surviving children, and the legal heirs of such as may be deceased."

The testator's son John died before the testator, leaving his wife "then living." She survived the testator, but died before the testator's widow. John not having left any surviving issue, the question is whether John's widow became entitled to one fourth of the devises and bequests made to John by his father's will. I can see no reason why not. It appears to me, the exact contingency in the mind of the testator, upon which he designed to make the widow of his son the recipient of his bounty, has arrived. John has died "without lawful issue," leaving his wife "then" "living." In such case, says the testator, I give one fourth, "of the devises and bequests made to him in this will," "to his wife." Suppose this clause had not contained the words "then living," and provided for the gift of one fourth to John's widow in case he died without issue, could there have been a doubt that the widow would take, whether that contingency occurred before or after the testator's decease? The very object of such provisions is, in general, to prevent a lapse, and it might as well be contended that John's issue, if he had left any, would not have taken under the clause in favor of issue, as that the widow does not take. The condition annexed

## GOODALL vs. M'LEAN.

to the devise to John's widow, that she shall "be then living," refers by the context to the time of John's death. The words are, "upon the death of either of my sons," &c., the one-fourth part, &c., shall go to his wife if she shall "*then* be living." When? Why, "then;" that is, "upon the death" of her husband. There can be no doubt this is the plain, ordinary, literal signification of the clause. Intention is to be gathered from the language of the will in its usual, customary meaning, unless the terms are controlled by other words which go to show a contrary sense. It is urged, in the present case, that the proviso, "if she shall then be living," was intended to apply to the time of distribution, and not to the time of John's death. Such a rule of construction has been applied to a clause of *survivorship*, where, after a previous life estate, the remainder has been directed to be distributed among a *class* of persons, after the death of the life-tenant. But in these cases, the provision for survivorship has been immediately connected with the direction to pay or distribute. I am not aware of any case where there has been a general clause of substitution, independent of any particular bequest, and applicable to all the gifts of the will, which has been limited because one of the gifts happened to be postponed in possession until after the death of a tenant for life. In this will there is a devise of real estate to John, which had effect as a vested interest, though not in possession, immediately on the testator's decease; and it cannot be contended that John's widow was not entitled to one fourth of that; for she was living both at John's death, and at the testator's death, when that devise became operative. So, also, two-thirds of the rents and profits of the residue of the estate are given by the will to the testator's children, and that devise took effect when the testator died. John's widow accordingly took one fourth of John's share in these rents. John's share in the proceeds of the property which was sold after his mother's death, would, if he had survived his

father, have been a vested interest ; and his widow became entitled to one fourth of that likewise, though the possession or distribution was postponed for the convenience of the estate. The event on which John's widow was to be substituted, was his death. It was not required to be his death at any particular time, as after the demise of the testator ; and, therefore, death at any period is within the terms of the will, free from any condition, except that when it occurs his widow must *then* be living in order to become an object of the testator's bounty.

A clause of substitution is generally to be referred to the death of the testator (*Maberly vs. Strode*, 3 *Vesey*, 450. *Brown vs. Bigg*, 7 *Vesey*, 279.) It may be laid down pretty broadly, that where the devise or bequest is to the donee by name with a gift over in case of death, if the event happen in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease. (*Darrel vs. Molesworth*, 2 *Vernon*, 378. *Haughton vs. Harrison*, 2 *Atk.*, 329. *Mackinnon vs. Peach*, 2 *Keen*, 555.) In the case of *Le Jeune vs. Le Jeune*, 2 *Keen*, 701, the will gave an estate for life to the testator's wife ; directed the sale of the property at her decease, and the distribution of certain shares of the proceeds among the testator's sons *living* at their mother's death ; "and in case of either of their deaths," then the share of the one dying to be paid to his issue. One of the sons died *in the testator's lifetime*, leaving a daughter who survived the testator, and she was held to be substituted to her father's share. (See *Rheeder vs. Over*, 3 *B. C. C.*, 240.) In *Humphreys vs. Howes*, 1 *Russ & My.*, 639, there was a trust for life, and then a direction to pay E. & F. or the survivor, and in case both should die without issue before their shares were payable, then to pay other parties. E. & F. both died without issue, *in the testator's lifetime*, and the ulterior bequests were sustained. In *Wilting vs. Baine*, 3 *P. Wms.*, 113, the will gave a certain

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GOODALL vs. M'LEAN.

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sum to each of the testator's children, payable at 21 ; and in case of the death of any before that age, then to the survivor. A child died *before the testator*, and his legacy was held to survive. In *Walker vs. Main*, 1 Jac. & Walk., 1, there was a devise of real estate to the wife for life, and then a trust to sell and distribute among children and grand children ; but if any of them died before his share becoming due, then to the survivors. Two of the children died *in the lifetime of the testator*, and it was determined that their shares passed to the survivors. The case of *Thornhill vs. Thornhill*, 4 Madd., 377, is the only one to be found sustaining a contrary doctrine ; and it is not only opposed to the current of decisions, but its authority has been very explicitly denied in *Smith vs. Smith*, 8 Simon, 353. In *Smith vs. Smith*, the residuary estate was given to trustees in trust for the testator's wife for life, and on her decease to divide among all his children *then living* ; and if any should die in his wife's lifetime, then his or her share to go over to issue. One of the children died *before the testator*, and his issue was declared to be entitled. (See *Giles vs. Giles*, 8 Sim., 360. *Collins vs. Johnson*, 8 Sim., 356, n. *Jarvis vs. Pond*, 9 Simon, 549.) It appears, then, that the death of the testator's son John in his lifetime did not prevent or defeat the ulterior gift of a portion of the share devised to him, over to his wife ; and as the words "then living" are referable to the time of John's death, the conclusion is inevitable, that on the testator's decease John's widow took a vested interest in one fourth of all the devises and bequests made to John. The decree must direct a distribution of the estate accordingly, and the portion given to John's widow must be paid to her administrator.

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STILWELL vs. DOUGHTY.

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## STILWELL vs. DOUGHTY.

*In the matter of the estate of SAMUEL STILWELL, deceased.*

The testator having given his wife the clear income of certain real estate, and an assessment having been levied upon the premises, for a permanent improvement, *Held* that the life-tenant should pay the annual interest on the assessment, and that the principal should be charged against the remainder men.

WM. FULLERTON, for Devises in fee.

Samuel Stilwell by his will gives to Elizabeth Stilwell, during her life, the clear income of his real estate.

Some of this real estate is situate upon a street through which a sewer has recently been constructed; and the expenses thereof have been assessed against the "heirs of Samuel Stilwell," and are a lien upon the lands in question.

The question is—who is to pay the assessment; and if the tenant for life and remainder men are to contribute to the payment thereof, then in what proportions?

The fact that the testator gave Mrs. Stilwell the "clear income" of his real estate, can make no difference in the decision of this question. By *clear* income, is meant *net* income, or that which remains after the deductions to which the law subjects the fund.

Neither is it an open matter, whether the building of the sewer in question is a benefit to the property in question. That matter is "*res adjudicata*," and all parties concerned are concluded by it.

Again, although the assessment is against the "heirs of Samuel Stilwell," yet it is in fact an assessment against the land, and is a lien upon it.

## STILWELL vs. DOUGHTY.

Is this to be treated like the ordinary case of *a life estate in lands charged with an encumbrance*? Then the familiar rule is, for the tenant for life to keep down the interest out of the rents and profits, leaving the remainder men to pay the encumbrance. (4 *Kent*, 74, and cases cited in note.)

It is equity, that every person having an interest in the real estate should share in the expense of every thing that is done for its benefit. This sewer is deemed a benefit to the property, which the tenant for life enjoys during the continuance of the life estate, and for which she must at least contribute, if not pay the whole expense.

Suppose the "heirs of Samuel Stilwell" should refuse to pay the assessment, the lands would be sold unless the tenant for life should relieve them by paying it. This she might do, and if not bound to pay the whole could hold the same as a charge upon the lands, but without the ability or right to collect interest during her life. (4 *Kent*, 74. *Cogswell vs. Cogswell*, 2 *Edwards's V. C.*, 231. See also *Williams vs. Cox*, 3 *Edwards's*, 179, and *Cairns and Wife vs. Chabert*, 3 *Edwards*, 312.) These cases are quoted on the brief of my adversary, but are conclusive against him, *taking this view of the case*.

It is true that the *land* does not belong to the tenant for life, but the *use* of it does. And in that way, the tenant necessarily derives a benefit from the improvements upon it for which assessments are made.

Suppose, in making an improvement where no part of the land was taken, but still was injuriously affected, instead of assessing benefits to be paid, there were damages to be *received*,—Who would be entitled to them? My learned adversary would not be willing to carry his doctrine so far as to say that his client (although she owned "little really of the land," and the damages *pro forma* were assessed to the "heirs of Samuel Stilwell") would not be entitled to an equitable apportionment.

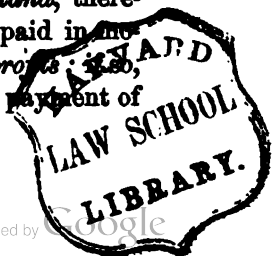
## STILWELL vs. DOUGHTY.

But is it not very doubtful whether the remainder men are compelled to pay any part of this assessment, and does it not fall entirely upon the tenant for life?

An ordinary tenant of lands (I mean by contract) is not bound to pay taxes or assessments, it is true, unless he has obligated himself to do so by express covenant; and the reason is, his obligations are governed by *his contract*. Not so, however, in a case like this. The obligations of the tenant for life are cast upon him by operation of law.

This is not an incumbrance upon the property created by the ancestor. In a case of that kind, the equity of making the tenant for life pay the interest, and the remainder man the principal, is apparent; because the tenant for life enjoys the estate *just as the ancestor left it*, and the remainder man *receives it in the same condition*. This is equity. And why should not the same rule apply in a case where the incumbrance is created subsequent to the creation of the life estate, so far as the remainder man is concerned? In other words, is he not entitled to receive the land, when the life estate falls in, in the same condition in which it was left by the ancestor? Would it not seem just to compel the tenant for life to leave the estate in the same condition as when the life estate commenced?

There is certainly great force in the position that the law devolves upon the tenant for life the payment of all taxes and assessments (and there appears to be no distinction (*The People vs. Mayor of Brooklyn*, 4 Coms., 419), which may be *created* during the continuance of the life estate. The tax or assessment must be *paid in money*. It cannot be left as a lien on the land, like a mortgage created in the lifetime of the ancestor. The *land*, therefore, must pay the assessment, and it must be paid in money. This would seem to reach the *rents and profits* also, then the tenant for life is chargeable with the payment of the assessment in this case.



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STILWELL vs. DOUGHTY.

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CHARLES EDWARDS, for Widow.

The tenant-for-life, here, takes her estate under the law of the time of her taking, and through the will of her husband. The law of the time calls her estate an estate of freehold; but makes it liable only for ordinary tax, which is raised generally and goes for general *present* benefit. The will of her husband might have made it subject to keep down interest on mortgages (as in *Cogswell* vs. *Cogswell*, 2 *Edwards*, V. C. R., 231), or debts (as in *Burges* vs. *Mauby*, 1 *Turn & Russ*, 167) and annuities and assessments.

It has not done so; and the Court have more than a right to presume that the testator meant that his wife should, after his decease, have an estate as certain in its extent as he gave it; and a court that charges her estate with any portion of speculative benefit to the land narrows the testator's intention. Indeed, as it seems to me, the will expressly bars off all extraordinary assessments and charges. She is to have *the clear income of all my real estate: i. e.* the clear income arising from tenants. Now, tenants do not bear assessments; assessments do not come out of income,—Mrs. S., indeed, only gets income; we are entitled to the clear income as received by the executor; and he cannot deduct from it, nor can he encourage the heir, who has no interest in the present “clear income” to compel payment out of it to meet an assessment for a sewer. The principle in *The matter of Ryder*, 4 *Edwds*. V. C. Rep., 338, should apply; and see what the Master of the Rolls says in *White* vs. *White*, 4 *Vesey*, 33, 34.

In *Williams* vs. *Cox*, 3 *Edwds*. V. C. Rep., 178, the Vice-Chancellor says: “Then, as to the assessments: these relate to a matter which benefits the fee, *and are to be borne by the heirs*. The complainant, who filed her bill for dower, is not to be chargeable with them. She must, however, bear one-third of the interest of the capital

## STILWELL vs. DOUGHTY.

of the assessment on the lots assigned to her for dower at seven per cent., which is to commence from the time the assessments were confirmed and became a charge, provided this was subsequent to the death of her husband, and, if not, then from his death." Observe, in this case the complainant had not bequeathed to her "the clear income of all real estate," but came for her common-law right of dower out of land already charged (all of it) with an assessment.

It is true that in *Cairns vs. Chabert, Id.*, 312, the Vice-Chancellor goes out of his way to touch the matter of assessments. I say goes out of his way, because, although the bill was to compel a tenant for life to keep down assessments as well as taxes, yet the matter of the taxes only came before the Court, on the motion; as the V. C. says: "Here the application is in regard to the payment of ordinary taxes." However, even taking the matter as connected with assessments, the whole amounts to little more than suggestion, cutting neither way—"The tenant for life is bound to keep down ordinary charges for taxes and repairs, out of the rents and income of the estate. The principle, *perhaps*, might not apply in relation to an assessment which goes to permanent benefit of the inheritance. In such a case, it is *likely* that some rule of apportionment would have to be resorted to."

The case of *Williams vs. Craig, 2 Edwards, V. C. Rep.*, 297, is not applicable, as the party attempted to be charged was made liable under an express covenant; nor, perhaps, is the case of *Astor vs. Miller, 2 Paige's C. R.*, 68, *S. C., on appeal, 5 Wend.*, 603; except that, as it appears in *5 Wend.*, it may be gathered—as a covenant to pay assessments runs strictly with the land, and the covenantor cannot be pursued personally—that here, as to our tenant for life, no personal claim can be made, and the assessment is fastened only to the *land*, which the heir

## STILWELL vs. DOUGHTY.

must now protect, so as to have the future benefit of the sewer.

The rights of a tenant for life are very much restricted ; and he cannot take from or charge the fee, and ought not, therefore, while so subject to restrictions, to pay for that which benefits what he does not fully, or, perhaps, not at all enjoy. He cannot cut timber, without being subject to an action for waste ; nor can he compel certain permanent and substantial improvements, *Nairn vs. Marjoribanks*, 3 *Russ.*, 582 ; *Cogswell vs. Cogswell*, *ante* : nor charge for them, *Thurston vs. Dickinson*, 2 *Richardson's S. Car. Eq. Rep.*, 317. Why should, then, a remainder man, through the court, charge for permanent benefit which did not belong to the estate when the tenant for life entered, and which, perhaps, the tenant for life would have objected or did object to ?

The possession of the tenant for life, is no better than that of a tenant for a year ; for he may die in an hour. His uncertain term may, in the mind of man, be longer ; but the benefits of both, per year, are the same and no more.

A tenant for life is to leave as he takes. In this case, Mrs. Stilwell would leave it better, if she is to pay for a sewer, which she must leave, and which did not attach when she entered.

The case of *Sutton vs. Chaplin*, 10 *Ves.*, 66, has relation to when taxes and charges became due after death of tenant for life.

The principle of contribution applies, where all have a present mutual benefit, and is based upon the present.

A tenant, either for life or otherwise, receives no benefit from a sewer unless such tenant goes to an *extra* expense of connecting the usual conveniences of the house with it ; an expense almost always borne by an owner of the fee. There is no benefit until such connection ; and the tenant may not care for, or the premises at the present require it ; while, if it be a sewer not fronting or adjacent, the benefit

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STILWELL vs. DOUGHTY.

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cannot be immediate, and, probably, will never be of the slightest advantage to the occupancy of the tenant for life.

There is no law that compels the tenant for life to pay a portion of the assessment for a sewer; and principles of equity should not compel it. If, however, such a thing should be adjudged, it would be through interest on the amount.

The old equity, of compelling a tenant for life to bear a portion of the principal of charges on the property (I refer to charges generally put on by testator, &c.), has long been exploded.

But, *in fine*, it is insisted that this case is outside of reported decisions; because the testator, Samuel Stilwell, has so given a life estate to his wife, that, by the term of the bequest, it is free from deduction on account of this special assessment.

The Surrogate should adjudge that the tenant for life stands free from this assessment.

THE SURROGATE. The testator's will contained the following clause: "Item—I give, devise, and bequeath to my wife, Elizabeth, during her life, and for her use, the house and appurtenances where I now reside, and the clear income of all my real estate, except the land in Broome County." An assessment for a sewer in Chatham Street has been laid upon a part of the premises devised, and a difference has arisen as to the payment, and by whom this charge is to be borne, by the life-tenant or the remainder men. The will gives the widow the "clear income;" and by that expression I do not understand the gross income, free from any charges, but the income remaining clear after the payment of the current expenses necessary to keep up the estate—the net revenue or produce of the property. To sustain any other construction, to suppose that the widow was to take the income and let the taxes accumulate until,

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STILWELL vs. DOUGHTY.

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perchance, the estate were sacrificed, would require words of the clearest and most indisputable import, directions of the most explicit and unequivocal character. An extraordinary assessment, benefiting the fee, is, without doubt, not such a usual charge as should be borne *in toto corpore* by the life tenant. On the supposition of a benefit accruing to the estate, by the improvement for which the assessment is laid, the life tenant has only the use of the improvement to the extent of the annual value, and not of the gross charge. So, on the other hand, the remainder men have not the present use, and will derive no advantage until the estate comes in possession. It is equitable the parties should bear burdens proportioned to their interests; and I think the life tenant should pay the annual interest on the assessment, and that the principal should be charged against the remainder men. I see nothing in the authorities against this rule; and it seems to me the most equitable mode of apportionment, in the absence of proof on which to base any other ratio of adjustment more appropriate.

## KENNEY vs. THE PUBLIC ADMINISTRATOR.

## KENNEY vs. THE PUBLIC ADMINISTRATOR.

*In the matter of the estate of DAPHNE MYERS, deceased.*

Gifts, *causâ mortis*, should be sustained by the most satisfactory testimony. Evidence of the donee, uncorroborated by circumstances, is insufficient to establish the donation. Delivery is essential to the validity of a *donatio causâ mortis*, and is corroborative proof that the donation was made; but possession does not prove delivery, when the claimant has had opportunities of obtaining possession wrongfully.

Where the alleged donee was an attendant on the deceased during her last sickness, and both before and after her death denied any knowledge of the subject of the alleged gift, *Held*, that having assigned her rights to her son and become a witness, there was not, under the circumstances, such clear proof as the nature of the case required.

ROBERT B. ROOSEVELT, for Petitioner.

The bank book in this case was a Savings Bank Book, which was the voucher and evidence of Daphne Myers' interest in the bank, and without producing which to the bank no money, not even checks, could be drawn.

The law is, that notes and bills, to bearer or to order, whether endorsed or not, bonds and mortgages, whether assigned in writing or not, are subjects of gift *causâ mortis*. (*Harris vs. Clark*, 2 Bar., 94, *vide pp.* 98 and 101; 3 Brin., 366; 8 Shep., 185.)

A gift of the note of a third person is a symbolical delivery of the property. (*Coutant vs. Schuyler*, 1 Paige, 316; 24 Pick., 261.)

The delivery of any instrument by which the donee can obtain the money, or without which the donor cannot obtain it, is a good gift *causâ mortis*. (*Harris vs. Clark*, 3 Coms., 93, *vide pp.* 109, 114.)

The court will more readily construe any act into an assignment of a fund, if it assigns the whole, as in this case,

## KENNEY vs. THE PUBLIC ADMINISTRATOR.

than if it assigns a part. (*Vide same case, p. 107, latter part of § II.*)

Ellen Kenney, though carefully cross-examined, was contradicted in no point; and it can only be urged against her that she denied knowing anything about the book, lest it should be taken from her, by Mr. Riggs or the public administrator. She is nowise implicated in removing any property, if that was done; and both Mr. Riggs and Julia Bliss told her to stay with deceased. Her ignorance is the excuse for her fears. If Daphne Myers really thought her property was not safe, she could have given it in charge to Mr. Riggs. Her not doing so, confirms the idea that she had previously given it to Ellen Kenney. There are no equities in favor of the State against this poor woman's son, there being probably no relation, and certainly no other claimant.

PETER B. SWENY, *Public Administrator, in person.*

THE SURROGATE. The petitioner claims the benefit of an alleged *donatio causa mortis*, by virtue of an assignment from his mother, Ellen Kenney, the donee. Mrs. Kenney, the assignor, states that she attended the decedent during her last illness; and that some five days before her death, she gave her a Savings Bank Book, saying, "If she got well I was to return it to her, and if she died it was mine." This, it is contended, establishes a gift of the sum then on deposit in the Savings Bank. The sole witness produced to substantiate the claim, is the alleged donee; and on the other side it is shown by several witnesses, that since the time Mrs. Kenney states the book was delivered to her by the deceased, and as well after as before the death of Daphne Myers, she repeatedly denied knowing any thing about the bank book, when interrogated on the subject.

Gifts *causa mortis*, should be sustained by the most

## KENNEY vs. THE PUBLIC ADMINISTRATOR.

satisfactory testimony, or the door will be opened widely for fraud and imposition. It would be a precedent of the most dangerous character, to hold such a gift valid on the naked evidence of the donee, uncorroborated by any circumstances. Possession of the book does not prove delivery, because the party had abundant opportunity to get it under her control without the consent of the deceased. By the civil law, donations of this kind were required to be made in the presence of five witnesses, that being the number requisite to the formal execution of a codicil. (*Cod., Lib. 8, Tit. 57, § 4; Domat., § 3481, Strahan's Trans.*) The common law does not recognise this rule; and there have been cases in equity, on a bill filed against the donee, sustaining the gift on the answer of the donee and the possession of the property. Delivery is an essential requisite; and it is an important circumstance in the proof, when means of obtaining possession wrongfully have not existed. The conduct of the donee is also very material; and here she was guilty of concealment and falsehood, at a period when the validity of the gift, if the transaction was fair and honest, might have received the sanction of the decedent before competent witnesses. This circumstance, and her denial of any knowledge of the bank book, connected with the fact that this application has been made by her son under an assignment from her, must shake the reliance of the court upon her testimony. I should regret to be understood as saying anything more than that her conduct has been such, under the circumstances, as to lead to distrust; and since it seems that "the clear policy of the law is against the encouragement of gifts of this nature" (*Harris vs. Clarke, 3 Coms., 121*), and the spirit of the statute, relative to evidence in actions against executors and administrators by assignees, is hostile to the examination of the assignor (*Code, § 399*),—under all these circumstances, I cannot refrain from saying, that the petitioner has failed in adducing that clear proof

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BURWELL vs. SHAW.

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which the nature of the claim requires. This conclusion renders it unnecessary to consider the proposition that a gift and delivery of a savings bank book, constitutes a valid *donatio causâ mortis*. The petition is denied on the ground of insufficient proof.

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BURWELL vs. SHAW.

*In the matter of the estate of THOMAS S. HAMBLIN, deceased.*

AFTER probate and before issue of letters testamentary, a creditor or other party in interest may file an affidavit of intention to present objections against the grant of letters.

Whether the objector is a creditor may be disputed, and is a subject of proof not regulated by the statute nor determined by the affidavit.

The oath of the objector that he is a creditor, is enough in the first instance; but if the demand be denied, the objector will be compelled to set forth the particulars of his debt so as to indicate its nature and basis.

In all cases the question of interest may be raised, and it must be determined by the Surrogate. Where it is a question of substance, adverse testimony will be received; but in applications for an inventory, account, or increased security, the applicant is required merely to state his interest positively under oath, and if the facts stated show an interest, the merits of the claim will not be tried.

When an affidavit of intention to present objections has been filed, it is competent for the Surrogate, at the instance of the executor, to order the objections to be filed. The stay of the grant of letters thirty days does not stay proceedings on the objections within the thirty days.

JOHN COCHRAN and CLINTON HARING, for Objector.

A. A. PHILLIPS and J. R. WHITING, for Executrix.

THE SURROGATE. After probate, and before letters testamentary were issued, Sheldon Burwell filed an affidavit, stating that he was a creditor of the testator, and intended

## BURWELL vs. SHAW.

to present objections against the granting of letters. The executrix named in the will, now applies for an order to compel the alleged creditor to state the grounds of his claim, averring ignorance of his demand and belief that he has intervened for the purpose of delay. The statute authorises a *creditor* to file an affidavit of intention to oppose the grant of letters ; but whether the objector is a creditor, is the subject of proof—not regulated by the statute, and not determined conclusively by the affidavit. If the party state on oath in the first instance, that he is a creditor, that will, *prima facie*, justify staying the grant of letters. But if the executor come in and allege ignorance of the debt or deny it, and ask that the interest or claim of the objector be more particularly stated, I have no hesitation in saying that the objector should be compelled to set forth sufficient to show the nature and basis of the demand. If the section of the statute had authorized the stay on the oath of the party that he was a creditor, that would have precluded any further inquiry ; but the section does no such thing,—it leaves the question of fact whether the objector is a creditor, precisely where the question of interest is left in every case by the statutes relative to the estates of deceased persons. Whether a person claiming to oppose probate, to file allegations against probate, to have letters of administration, to call for an inventory or account, or demand payment of a debt, legacy, or distributive share, is in fact a creditor, legatee, or next of kin, must be determined by the Surrogate. In some cases, the allegation of interest is one of substance, and may be controverted by adverse testimony ; but where the application is only to have an inventory and account, or to compel an executor to give security, or an administrator to increase his bonds, it would be very inconvenient in the first instance to try the question of interest, and travel through a long investigation, before determining whether the application should be granted. The practice has been in that class of cases, to require

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BURWELL vs. SHAW.

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merely a positive allegation of interest; and if facts are stated on oath sufficient, if uncontroverted, to show a legal interest, the merits of the claim will not be tried before entertaining the application. The least the party can do, however, when his right to intervene is denied, is to show distinctly how his interest arises, so that, on the facts as he alleges them, the Surrogate may see whether on his own showing he possesses a sufficient legal interest. I must, therefore, order the affidavit of Mr. Burwell to be amended so as to indicate the grounds on which he claims to be a creditor.

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*In the same matter.*

SEVERAL parties having filed affidavits stating that they were creditors of the deceased, and intended to present objections against a grant of letters to the executors or one of them, the executrix has applied for an order to compel the creditors to file their objections. The statute directs, that on filing the affidavit of intention to object, the Surrogate "shall stay the granting of letters testamentary for at least thirty days, unless the matter shall be sooner disposed of." (*Laws, 1837, Ch. 460, § 22.*) It is clear, therefore, that the matter may be disposed of before the expiration of thirty days; and, no specific time being allowed to file the objections, I think the whole proceeding is under the control of the Surrogate. If the executor comes in and demands the exhibition of the objections, and there appears no reasonable ground for delay, it is competent to order the objections to be filed, to hear the allegations of the parties, and determine the case within thirty days. The creditors must therefore, be ordered to bring in their objections within a certain time.

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MASON vs. JONES.

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## MASON vs. JONES.

*In the matter of the estate of JOHN MASON, deceased.*

H. A., one of the next of kin, having within a year after probate filed allegations against the validity of the will and the competency of its proof, and the Surrogate having confirmed the probate, and his decision having been affirmed, on appeal, by the Circuit Judge, an appeal was taken to the Court of Chancery, and was heard by the Supreme Court, as a proceeding pending in Chancery at the time of the adoption of the new constitution.

By the decree of the Supreme Court, the will was declared not to have been sufficiently proved, the decisions of the Surrogate and the Circuit Judge were reversed upon a question of fact, and a feigned issue was ordered, to try the questions arising upon the application to prove the will on the allegations. The issue was tried, and the jury found that the instrument was not the last will and testament of the deceased. J. M., one of the next of kin, filed with the Surrogate a copy of the verdict, and a certificate of the County Clerk that it was a final determination of the issue by the jury; and he thereupon moved for a revocation of the probate. *Held*, that it was not proper to revoke the probate until the final decision of the issue should be certified by the Court.

It *seems* that the statute has not conferred the right upon a party who has not filed allegations and who has not appealed, to contest the probate on allegations filed and appeal taken by another party. Whether, independently of the statute, such right exists by the course of the ecclesiastical practice,—*Quære*.

When, upon allegations, it has been finally determined that the will is not sufficiently proved, any of the next of kin not a party to the contest, may avail himself of the decision though it was not obtained at his instance.

Proceedings in respect to probate or administration, are not properly suits or actions, but are special proceedings of a mixed character, capable of being promoted by any one interested; and, when finally determined, the judgment partakes so far of the character of a judgment *in rem*, that any other party in interest can avail himself of it.

The final decision as to testacy or intestacy, when regularly obtained, is conclusive as to all the world.

The only case where the statute directs a feigned issue as to the validity of a will, on appeal, is where the Circuit Judge has *reversed* the decision of the Surrogate on a question of fact.

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MASON vs. JONES.

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In the present instance, the decree of the Supreme Court was not a final determination upon the merits, but contemplated further proceedings before deciding upon the validity of the will. If the trial of the issue took place under the provisions of the statute, the Supreme Court had power to order a new trial. If the issue was a feigned issue out of Chancery, for the purpose of informing the Court, the verdict may be set aside, or judgment be given without regard to the verdict.

J. J. RING, *for Petitioner.*

M. S. BIDWELL and F. B. CUTTING, *for Executors.*

THE SURROGATE. John Mason died September 26, 1839. An instrument propounded as his last will and testament, was duly admitted to probate by the Surrogate, October 21, 1839; and letters testamentary were issued to the executors. On the 20th day of October, 1840, Joseph Alston and Helen his wife, in the right of the latter as one of the next of kin, filed allegations against the validity of the will and the competency of the proof thereof. The executors and legatees were cited to appear before the Surrogate, and show cause why the probate should not be revoked. The Surrogate, having heard the proof of the parties, confirmed the probate, on the 20th of June, 1842. Mr. Alston appealed to the Circuit Judge, who affirmed the Surrogate's decision, on the 23d of November, 1844; and he then appealed from the decision of the Circuit Judge to the Court of Chancery. The case was pending before the Chancellor; and by Article XIV., § 5, of the new constitution, jurisdiction of the appeal as a proceeding then pending in the Court of Chancery, was vested in the present Supreme Court. A decree was pronounced at a general term of the Supreme Court, on the first Monday of June, 1848, declaring that the "order or decision of the said Surrogate, and also the said decision of the said Circuit Judge, are and that each of them is erroneous in this, to wit, that the said paper-writing purporting to be the last

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MASON vs. JONES.

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will and testament of the said John Mason, deceased, was not before said Surrogate, and, on the proof certified by him, is not sufficiently proved to be such last will and testament; and it is therefore ordered, adjudged, and decreed, that the said last-mentioned order or decision of the said Surrogate, and the said decision of the said Circuit Judge, and each of them, be and the same are and each of them is hereby accordingly reversed; and such reversal being founded upon a question of fact as aforesaid, it is further ordered, adjudged, and decreed, that a feigned issue be made up between the above-named appellants of the one part, and the above-named respondents of the other part, to try the questions arising upon the application to prove the said will on said allegations, against the same, \* \* and that the form of such issue be settled by any one of the Justices of this Court," &c.

The issues made up under this order, were tried at a Circuit Court held by his Honor Judge Roosevelt, and a verdict rendered January 13, 1853. The jury found that the instrument was declared by John Mason to be his last will and testament "without knowledge;" that he requested the witnesses to attest it; that execution was not procured by fraud, circumvention, undue influence, force, or coercion; but that it was not "the last will and testament of the said John Mason;" that at the time of execution he was not "of sound mind and memory, and in all respects capable of making a will;" and that the instrument was not "freely and voluntarily executed or made as his last will and testament by the said John Mason."

James Mason having procured a copy of the verdict, and a certificate by the County Clerk, that it was "the final determination" of the issues "by said jury," filed the same in this court on the 14th of January, 1853; and he now moves the Surrogate to revoke the probate of the will of John Mason, and to grant him letters of administration as in case of intestacy.

## MASON vs. JONES.

1. It is first objected that James Mason not having filed allegations against the will, is not entitled to avail himself of the decision. The citation on allegations issues to the executors and *legatees*, and not to the next of kin; and from this it would seem, that only the executors and *legatees*, *i. e.*, those interested to support the will, were proper parties before the Surrogate. The next of kin may file allegations contesting the probate; but there is no provision for the next of kin to intervene in opposition to allegations, or in support of them where they have been filed by other parties. The presumption is, that James Mason was cited to attend the hearing on the allegations as a legatee, which character constituted his only title to be cited. But in what right was he made party to the appeal? Appeals from the decisions of Surrogates on allegations, "may be made in the manner, within the time, and with the effect prescribed by law" (2 *R. S.*, p. 62, § 35). Whether the mode prescribed by law, was an appeal directly from the Surrogate to the Chancellor, or from the Surrogate to the Circuit Judge, was decided by the Chancellor, in *Alston vs. Jones*, 10 *Paige*, 98, who determined that the appeal from the decision of the Surrogate on allegations, was to the Circuit Judge.

The section of the statute authorising appeals to the Circuit Judge on the original probate of a will, was declared to be applicable to allegations against a probate already granted. That section (2 *R. S.*, p. 66, § 55) authorises an appeal by the *next of kin*, from a decree of original probate; but, as already seen, next of kin are not parties respondents to allegations filed after probate. Could they appeal as next of kin, when they were not parties in that character? James Mason never filed allegations against the will; nor did he appeal from the decision of the Surrogate, confirming the probate. Could he on the allegations filed by another person, be heard against the will before the Surrogate, or before the appellate court?

On the hearing before the Circuit Judge, notice is required to be given only "*to the parties who appeared before the Surrogate in opposition to such appellant.*" (2 R. S., p. 608, § 94. *Chaffee vs. Baptist Missionary Convention*, 10 Paige, 85.) The statute, therefore, would not seem in terms to confer the right upon a party, who had not filed allegations, and who had not appealed, to contest the probate on allegations filed and appeal taken by another party. According to the course of the Ecclesiastical Courts in England, where a will has been proved in common form, the probate is called in at the instance of the next of kin, and the executor is put to proof *per testes*, in solemn form. In that case, any party in interest may contest the proofs offered by the executor, or intervene on appeal. (*Newell vs. Weeks*, 2 Phill., 224.) The effect of the provisions of our statute is to put the executors to proof of the will *de novo*, when allegations have been filed by any of the next of kin; and although only the executors and legatees are cited, yet it may be that relatives who have not filed allegations may be entitled to intervene against the will, even when the controversy has been instituted by others. Be that as it may, I have no doubt that whenever, on allegations filed by one of the kin of the deceased, the executors have failed in proving the will anew, and the court has decided that the will is invalid, any others of the kin interested in the estate may avail themselves of such decision, although the judgment has not been obtained at their instance. Proceedings in respect to probate or administration, are not properly suits or actions; they are special proceedings of a mixed character, capable of being set in motion by any one interested; but when brought to a final conclusion, the judgment attained partakes so far of the character of a judgment *in rem*, that any other party in interest can avail himself of it. A legatee, for example, who has failed to propound a will, still may, when the will has been propounded by another legatee and been proved, have the benefit of a

## MASON vs. JONES.

probate so obtained. And one of the next of kin likewise—where probate has been called in, the will been contested and rejected as invalid, on the application of another person—may have the benefit of the judgment revoking the probate. The final decision, as to whether the deceased died intestate, or as to the validity of an alleged will, when obtained in regular course of law, is conclusive as to all the world. If, therefore, the allegations against Mr. Mason's will have been finally determined, I think it competent for any person interested in his estate to intervene on the basis of such final decision.

2. Have these allegations been finally determined? The statute directs that when on appeal from the Surrogate to the Circuit Judge, the latter shall "*reverse*" the decision of the Surrogate, "*upon a question of fact*" (2 R. S., p. 66, § 57), he "shall direct a feigned issue to be made up to try the questions arising upon the application to prove such will, and shall direct the same to be tried at the next circuit court to be held in the county where the Surrogate's decision was made." This is the only provision made for a feigned issue; and whether an issue shall be directed or not, is not a matter of discretion with the Circuit Judge, but he is imperatively required to order an issue whenever he *reverses* the decision below, *on a question of fact*. The single condition on which the award of an issue depends, is the reversal on a question of fact. If he reverses *on a question of law*, or if he *affirms*, then no jury is directed, but an appeal lies to the Chancellor. Now, in the present case, the Circuit Judge did not *reverse* the decision of the Surrogate; but he *affirmed* it, and an appeal was taken to the Chancellor. The exigency on which the statute made the feigned issue to depend, never occurred; and the *stage* of the case in which that exigency might have occurred, passed away. There can be no doubt, then, that this issue is not the issue directed by statute when the Circuit Judge reverses the decision of the Surrogate on a question of fact.

Whether, however, it is to be treated as such an issue, or is to have the effect of such an issue, on the ground that the decree of the Supreme Court is to be regarded as in effect the decree which the Circuit Judge *ought* to have made, is entirely another question. So far as the Circuit Judge was concerned, the allegations were finally determined. He affirmed the Surrogate's decision; and an appeal being taken to the Chancellor, the papers were remitted to the Surrogate (2. *R. S.*, p. 609, § 97), and the case passed out of the hands of the Circuit Judge. The Surrogate then certified the proceedings to the Chancellor (*ibid.*, § 102), who was required by the statute, to "proceed therein, as in cases of appeals from Surrogates" (*ibid.*, § 103.)

3. The appeal pending before the Chancellor was transferred, by the new constitution, to the Supreme Court, to be disposed of in the same course of procedure as would have been proper had it remained with the Chancellor. The tribunal was changed; but the principles applicable to the disposition of the case were not. They remained the same. On hearing the case, the Supreme Court reversed the decisions of the Surrogate and the Circuit Judge, and awarded a feigned issue. James Mason, claiming that the reversal was a final decree, which made it the duty of the Surrogate to revoke the probate, and that the award of an issue was void, applied on these grounds for a revocation of the probate. Judge Ingraham, acting as Surrogate, denied the application, holding that the decision of the Supreme Court was not a final determination of the case on the merits. I entirely concur in that conclusion (*ante*, p. 181). That the Supreme Court never designed the simple reversal of the decree below to be a final decision as to the validity of the will, is apparent from the fact that an issue was ordered. The mere reversal, standing alone, and certified by the Court to the Surrogate, might be final; but a reversal followed by an award of a feigned issue contemplates other proceedings before determining on the validity of the will. The award

## MASON vs. JONES.

of the issue is not inconsistent with the reversal. It is just what the statute directs when the Circuit Judge reverses on a question of fact; and his *reversal* of the decree below is a necessary prerequisite to ordering an issue. The reversal is founded on the evidence taken before the Surrogate. On that evidence, the Supreme Court decreed that the will was insufficiently proved, that the Surrogate erred in confirming the probate upon the proof before him, and therefore his decree must be reversed; and then, the reversal being on a question of fact, the Supreme Court think proper to send the case to a jury and allow the parties an opportunity to produce new testimony. If on such trial the jury should find that the will was sufficiently proved before them, that finding is not necessarily inconsistent with the decision of the Supreme Court,—that the will was not sufficiently proved before the Surrogate; and there is no absurdity in the Court saying that while on the evidence below the proof was defective or unsatisfactory, yet on the trial of the issue the proof was sufficient, and while, on the evidence below, they reversed the Surrogate's decree, yet on proofs adduced before the jury, and on the verdict, they confirm the probate. Viewing, then, the award of the issue as regular and valid, and finding on the face of the decree no indication of what the Court designed after the issue had been tried, whether the verdict should be certified to the Surrogate, as in case of an issue ordered by the Circuit Judge; or whether the Supreme Court would still retain the appeal for further action,—I think it improper for me to proceed on the certificate of the County Clerk, as to the result of the trial. If the trial is to be considered as had under the statute, the Supreme Court may order a new trial; and a stay of proceedings has been ordered against Mr. Alston, for the purpose of making that motion. If the issue is an issue out of Chancery on appeal, for the purpose of informing the conscience of the Court, then the Court may set it aside, or utterly disregard it, and give final judg-

ment for or against the validity of this will (*Lansing v. Russell*, 2 *Comstock*, 563); and in that contingency, an appeal will still lie to the Court of Appeals. Finally, I think the certificate of the verdict by the County Clerk insufficient ground for revoking a probate, even when the issue was awarded by the Circuit Judge. The County Clerk certifies that the issue was tried by a jury, and that the verdict was "the final determination thereof by said jury." Of course it was; but that may not be the final determination of the issue; for a new trial may be ordered again and again. It is the final determination of the issue, absolutely, which must be certified to me, and not its determination by a particular jury; and that certificate must show that the Court certify to the Surrogate the final determination, or have authorized such certificate. The only two precedents I find on the records are in that form. The certificates in the cases of *The Will of Benjamin Taylor* and *The Will of Benjamin Romaine*, in both of which feigned issues were ordered, were signed by Justice Edwards. I have no hesitation in holding the certificate of the County Clerk in the present instance entirely insufficient, and, therefore, in every view of the case, must deny the application.

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HOLLAND vs. FERRIS.

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## HOLLAND vs. FERRIS.

*In the matter of the Estate of JOHN CLAXTON, deceased.*

LETTERS of administration on the estate of the deceased, as an intestate, having been issued, and some of the next of kin having applied for a revocation thereof on the ground that the deceased left a will; and it appearing that a will had been executed, but there being no proof that the will was in the possession of the deceased, or unrevoked, at the time of his death,—*Held*, that when administration has been granted, and an existing will, or a will lost or fraudulently destroyed, is alleged but not proved, it is generally improper to revoke the letters.

If a will proved to have been executed, and to have been in the possession of the decedent, cannot be traced to the custody of another, or cannot be found, the presumption of law is, that it has been destroyed *animo revocandi*.

GEORGE SULLIVAN, *for Petitioners.*

MARCUS P. FERRIS, *Administrator, in person, and by THOS. W. CLERKE.*

THE SURROGATE. On an allegation that he was a creditor of the estate, and that the deceased left no last will and testament, letters of administration were granted to Marcus P. Ferris, on the fourth day of January last. John and Ann Holland, in the right of the latter as sister and one of the next of kin of the deceased, apply for the revocation of the letters of administration, on the ground that Mr. Claxton did not die intestate. The evidence shows that in August, 1848, he had a will among his papers, and some of the provisions of the instrument are proved; but there is nothing to indicate that the will was in his possession or unrevoked at the time of his death. Mrs. Jackson, who took possession of his papers, is now beyond the jurisdiction of the court; and there seems at

present no possibility of having any satisfactory proof showing whether or not the decedent left a valid will, or whether, if such an instrument was existing shortly before or at the date of his decease, it has been lost or destroyed. If a will proved to have been executed, and to have been in the possession of the decedent, cannot be traced to the custody of another, or cannot be found, the presumption of law is, that it has been destroyed *animo revocandi*. There is nothing in this case tending to establish, with any reasonable degree of certainty, the existence of a will when Mr. Claxton died; though the conduct of the party who examined and took possession of his papers, and subsequently left the country, has very naturally given rise to unfavorable surmise and suspicion. The statute provides, that a lost or destroyed will shall not be allowed to be proved, unless it is shown that it existed at the time of the death of the testator, or was fraudulently destroyed in the lifetime of the testator; and in case of an application to the Supreme Court to prove such a will, authority is given to restrain the administrator *pendente lite*. (2 R. S., 68, §§ 65, 67.)

Where administration has been granted, and an existing will, or a will lost or fraudulently destroyed, is alleged but not proved, it is generally improper to revoke the letters. There is no assurance that proceedings will be instituted to establish the instrument, and no reason why, pending such proceedings if instituted, the estate should be unrepresented. If the parties desire to prosecute their claim, the court whose power shall be invoked for that purpose, and having jurisdiction of the proof of lost wills, can afford every proper protection against acts of the administrator injurious to the persons claiming to be legatees or devisees. The application to revoke the letters of administration must be denied.

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BOWEN vs. BOWEN.

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BOWEN vs. BOWEN.

*In the matter of the estate of FRANCIS BOWEN, deceased.*

THE brother of the intestate, nearly two years after his death, presented a claim for services and assistance in his business, for a period of five years before his decease. It appearing that the claimant was boarded and clothed by the intestate,—*Held*, under the circumstances, that no express contract having been proved, and no demand shown in the intestate's lifetime, the law did not imply an agreement to compensate the claimant.

Demands of this nature are not to be regarded with any favor; and the evidence should be clear, that the services were performed under a mutual expectation of compensation.

T. W. SMITH, *for Petitioner*,  
GEO. SHEA, *for Administratrix*.

THE SURROGATE. The deceased died intestate, leaving a small property to descend to his widow and children. Nearly two years after his death, his brother, Michael Bowen, put in a claim of \$555, for services rendered the deceased, as clerk, from January, 1845, to February, 1848, and from August, 1848, to April, 1850, when the intestate died. No express contract is proved, but it is urged that the law will imply an agreement to compensate him. That must depend upon all the circumstances. The claimant came to this country at the instance and expense of his brother, who kept a small grocery-store in this city. He attended the store, and was boarded and clothed by his brother; but it does not appear that he ever presented a claim for wages until long after his brother was dead. Demands of this character are not unusual in administration cases; and, as the party who had the best means of controverting them has been removed by death, they

## BOWEN vs. BOWEN.

are not to be regarded with any favor, especially where the claimant has allowed his claim to sleep during the lifetime of the decedent. In all cases of this kind, the evidence should be very clear that the services were performed by the claimant, expecting to be paid for them, and that the decedent so understood it, or had reason to believe he was to be charged therefor. In *Davies vs. Davies*, 9 C. & P. 87, the plaintiff and his wife boarded and lodged in the house of the defendant, and assisted him in his business; and it was held that neither the services on the one hand, nor the board and lodging on the other, could be charged for, unless the jury were satisfied that the parties came together on the terms that they were to pay and to be paid. In *Weir vs. Weir's Admr.*, 3 Ben Munroe's R., 645, the plaintiffs were nephews of the deceased, and had emigrated to this country some years before the death of their uncle, without property or means, and were taken into his employment, clothed and decently supported by him. They assisted him in his business, one for twenty years, and the others for six and eight. It was held that the estate of the deceased was not liable. In *Robinson vs. Cushman*, 2 Denio, 149, the plaintiff was sister of the intestate, lived with him nearly fourteen years, and assisted him in the affairs of his family. A sealed note was found among his papers, by which he promised to pay her \$2,000, "for value received, and justly and truly due her for services rendered me during my illness;" and yet the court held that she could not recover. The principle applicable to this class of cases cannot be better stated than in the language of the court in *Williams vs. Hutchinson* (3 Coms., 312). "Under certain circumstances, when one man labors for another, a presumption of fact will arise, that the person for whom he labors is to pay him the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case, and the ordinary dealings between man and

## BOWEN vs. BOWEN.

man ; but where the services are rendered between members of the same family, no such presumption will arise. We find other motives than the desire of gain, which may prompt the exchange of mutual benefits between them ; and hence, no right of action will accrue to either party, although the services or benefits received may be very valuable. And this does not so much depend on an implied contract that the services are to be gratuitous, as upon the absence of any contract or promise that a reward should be paid." (See *S. C.*, 5 *Barb. S. C. R.* 122 ; *Andrus vs. Foster*, 17 *Verm. R.*, 556 ; *Fitch vs. Peckham*, 16 *Id.*, 150 ; *Swires vs. Parsons*, 5 *Watts & Serg.*, 357 ; *Candor's Appeal*, *Ib.*, 513 ; 4 *C. & P.*, 93). The language of the cases is very decided, and the justice of the reasoning against such claims commands conviction. In the present instance, the petitioner was taken into the family of his brother, before attaining full age. He was boarded, lodged, and clothed. There was no contract of hiring—no demand for wages made before the relation terminated ; there were no accounts kept ; and there is no proof of an expectation on either side to pay or be paid ; and not a word is heard of a demand, sufficient to sweep away half of the little estate left his widow and children, until it starts into existence nearly two years after Francis Bowen's decease. I have no hesitation in rejecting such a claim. To support it, the petitioner would have to produce very clear and reliable evidence of an express contract ; and there not being shown a single fact tending to that point, he has entirely failed in establishing any debt against the estate.

## BLOOMER vs BLOOMER.

## BLOOMER vs. BLOOMER.

*In the matter of the Estate of THOMAS BLOOMER, deceased.*

THE will of the decedent having been proven in the county of New York, and letters testamentary issued; on the final accounting of the executrix, it appearing that the testator, at the time of his death, was domiciled in the State of Connecticut,—*Held*, that the law of the domicile governs as to the question of testacy or intestacy, in respect to personal estate; and the proper tribunal of the domicile having adjudged the will revoked by the subsequent birth of a child to the deceased, it was incumbent upon this court to hold the will invalid as a will of personalty.

The invalidity of a will as to personalty does not, of necessity, render it invalid as to realty, as real estate is governed by the *lex loci*. The will in question being valid as to real estate in New York, and containing a direction for the sale of the real estate, and the distribution of the proceeds,—under which direction the lands were sold,—*Held*, that the Surrogate had jurisdiction to order distribution. *Held*, also, that the personalty was distributable, as in case of intestacy, according to the laws of Connecticut; and that the disposition of the proceeds of the realty must be regulated by the laws of New York, which give to a post-testamentary child the same portion as would have descended had the parent died intestate.

The whole real and personal estate having, by the terms of the will, been thrown into one fund, applicable to the discharge of the various bequests; and two legatees having, in consequence of the revocation of the will as to the personal estate, been left to the proceeds of the real estate alone for payment,—*Held*, that the other legatees, who were next of kin, should be put to their election to take under the will or against it.

As a general rule, the competency of evidence is governed by the *lex fori*, and not the *lex domicilii*.

By the civil law, the birth of a child, which the testator did not foresee, revoked the whole testament, but did not revoke a codicil, where there was no testament.

By the common law, the birth of a child, in connection with other circumstances, might be sufficient to establish an implied revocation. This rule has been adopted in this country, either to the extent of revoking the will entirely, or *pro tanto*, so as to let in the children born after the making of the will.

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BLOOMER vs. BLOOMER.

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Whether, at common law, a will of personalty, not disposing of the whole estate, would be revoked by the birth of a child, and an alteration of circumstances,—*Quære?*

Whether, at common law, a *donatio causâ mortis*, not disposing of the whole estate, would be revoked by the birth of a child,—*Quære?*

Gifts *causâ mortis* are of a mixed nature, resembling gifts *inter vivos*, in the essential requisite of delivery, and resembling legacies in being subject to the debts of the deceased, and in being ambulatory or revocable, and contingent on death.

By the law of Connecticut a will, whether making a total or partial disposition, is revoked by the subsequent birth of a child, if no provision has been made in the instrument for that contingency; and where a will would be revoked by such a circumstance,—*Held*, that a *donatio causâ mortis* would likewise be revoked.

An executrix, after letters issued and before the will was adjudged to have been revoked, having, under the testamentary directions, paid out of the personal estate a mortgage on the realty,—*Held*, that having acted in good faith, the payment must be allowed, leaving the legatees and next of kin to their claim against the land for the sum so paid.

CHARLES JUDSON, for Executrix.

I. A *nuncupative* will, at common law, was a full right to will all personal property without writing.

The statute law of England, and of many of the United States, has abridged and restricted the right. (4 *Kent Com.* 517. 1 *R. L.*, 1813, p. 367, sec. 14.) The Revised Statutes, except in case of soldiers and seamen (2 *R. S.*, p. 60, sec. 22), make such a will void.

Mr. Minor testified that, at common law, such a will was good in Connecticut, if made in the last illness and in view of approaching death.

Upon the law as proved, and upon Mr. Minor's testimony, the gift of the \$2,300 is a valid will.

II. The proceeds of the real estate in the city of New York, are not real estate. As to personal estate, there is no will. The proceeds must, of necessity, be treated as real estate. What was personal when Mr. Bloomer died, must be divided by the laws of Connecticut. As to the

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BLOOMER vs. BLOOMER.

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real estate and the power of sale, the will is good, no matter where made or where Mr. Bloomer died. He died intestate as to his personal property, but not as to his real estate in this State.

This court must enforce the will in this State, as far as it is a will. If, by the laws of another State, a part of the property is detached and taken away, that does not vitiate the will as to real estate here.

The investment of \$9,500 should be made.

III. Mrs. Bloomer, the executrix, is to be protected for all her acts until she was ousted as executrix. (2 *R. S.*, p. 79, *sec.* 47.)

Under the will she would be entitled, for the support of herself and family, to the income on \$31,000, exclusive of the house in Connecticut.

She has maintained all the children except two; and as to Mrs. Way and Thomas, payments were made on account of their supposed legacies.

IV. As to the household furniture, Mr. Minor's evidence is that, by the Connecticut law, she is entitled to it.

V. She is of course entitled to one-third part of all personal property of which she is not entitled to the whole.

VI. Mrs. Bloomer is entitled to be allowed one-third of the \$3,110 paid to take up the Connecticut mortgage. (1 *R. S.*, p. 749, *sec.* 4.)

She is also entitled to be allowed one-third of the amount she expended on the Connecticut house.

E. H. OWEN and JOHN E. BURRIL, for *Legatees and Next of Kin.*

THE SURROGATE. The will of the deceased was proved before me, and letters testamentary were granted to his

## BLOOMER vs. BLOOMER.

widow, the executrix. It now appears that the testator was domiciled, at the time of his death, at Greenwich, in the State of Connecticut; and by the law of that State, when, after the death of the testator, he shall have a child born for whom no provision has been made in the will, the will is revoked. There is no doubt that, in regard to personalty, the law of the domicil of the deceased governs as to the question of testacy or intestacy, and the distribution of the estate. (*Story's Conflict of Laws*, § 473). Mr. Bloomer's will has been declared void by the proper probate judge in Connecticut, in consequence of the birth of a posthumous child, and letters of administration were granted to his widow. The great bulk of the property of the deceased, was, at the time of his death, in the State of New York; and now, on the accounting of the executrix before me, several interesting points require to be settled.

1. The invalidity of the instrument as a will of personal estate by the law of the testator's domicil, does not of necessity render it invalid as a will of real estate. Real estate is governed by the *lex loci*. But whenever, for any reason, a portion of a will fails, it may become a question whether the general scheme and plan of the instrument viewed as a whole, have been so deranged—whether the purpose and intention of the testator have been so materially defeated—as to render the entire disposition invalid. This is a question of construction respecting the realty which does not fall within my jurisdiction, unless under the clause of the will which *directs* the real estate to be sold and the proceeds invested for the benefit of legatees. The will being valid as to that power, and the power having been exercised, and the real estate having been converted into personalty, it only remains for the Surrogate to direct the distribution of the estate. The personal estate will, of course, be divided as in case of intestacy, according to the laws of Connecticut; one-third to the widow, and the remainder equally among all the

## BLOOMER vs. BLOOMER.

children. As to the disposition of the proceeds of the real estate situate in New York, that must be regulated by our law, which gives to a post-testamentary child the same portion as would have descended if the father had died intestate. (2 *R. S.*, p. 65, § 49; *Mitchell vs. Blain*, 5 *Paige*, 588.) So far, there seems no difficulty. But the will throws the whole real and personal estate into one fund, applicable to the discharge of the various bequests; and as there are two legatees who, in consequence of the revocation of the will as to personalty by the laws of Connecticut, are left to the proceeds of the real estate alone for payment, I think the other legatees who are next of kin, should be put to their election. (*Hawley vs. James*, 16 *Wendell*, 142; and cases cited, 1 *Jarman*, 385.) If they claim under the will, it will stand entire, except as to the interest of the posthumous child; if they claim against the will, the two legatees who are not related to the deceased will take under the will, and the proceeds of the real estate will be sufficient to discharge their legacies.

2. The widow of the deceased claims that her husband, in view of his approaching death, gave her the sum of two thousand three hundred dollars. She produces no evidence of this, except her own deposition, voluntarily made, and not called for by the other parties. It appears, that by the laws of Connecticut, such evidence is competent.—(*Revised Statutes of Conn.*, 1849, p. 86, § 141). But as a general rule, the competency of evidence depends upon the *lex fori*, and not upon the *lex domicilii*; and although great effort has been made to give a larger latitude to the law of the domicil, I am not aware that courts have gone so far as to allow the law of the domicil to regulate the question whether or not a witness is competent to testify. (*Story's Conflict of Laws*, § 630, b). Independently of this difficulty, I think the validity of the gift as an effectual donation, supposing it well established by the proofs, depends upon another point. The birth of the testator's

## BLOOMER vs. BLOOMER.

posthumous child, by the law of Connecticut, revoked his will. This rule was adopted from the civil law. The power of disposing of property by will, as originally established by Solon, at Athens, was limited to the case where the testator had no children; and as this law was transferred by the Decemviri to Rome, the authority of the parent to give his estate and disinherit his issue, was also greatly restrained. It is somewhat curious to trace the influence of these early principles, through the current of the civil law as adopted and recognized in the various countries of Europe. It was the peculiar office of the Roman testament, to institute an heir; and the person so instituted, took the heritage as heir and not as purchaser. Children might be exheredated by testament, if a just cause, such as ingratitude, were assigned in the instrument; and the *querela inofficiosi testamenti*, was an action allowed in favor of children for rescinding testaments made to their prejudice, in which no cause or an unjust cause of exheredation was assigned. The birth of a child which the testator did not foresee, revoked the whole testament (*Dig., Lib., 28 Tit., 3, § 3*), as well the legacies, as the institution of an heir; for, as justly observed by Domat, "if the testator had foreseen the birth of this child, he would have burdened the succession with fewer legacies, or perhaps would have left none at all." (*Domat*, § 3132). For the same reason, the birth of a child revoked a codicil, where there was both a testament and a codicil; and yet it seems that when there was only a codicil and not a testament, the birth of a child did not annul it, because dying without a testament, the deceased intended to leave his succession to his heir-at-law, whoever he might be, burdened with the codicil. Domat questions the equity of this rule, instancing, as illustrative of its injustice, the case of an unmarried man making a codicil disposing of the greatest part of his estate, and willing to leave the small remainder to a collateral heir, and afterwards marrying,

## BLOOMER vs. BLOOMER.

having children, and dying without revoking the codicil, either through forgetfulness or because surprised by death.

On examining how far these doctrines of implied revocation were recognized in England, we find that the ecclesiastical courts very early adopted the rule that marriage and the birth of a child revoked a will of personalty; and the same principle was ultimately, but not without a struggle, applied to devises of real estate. Finally, it was held that it was not necessary that a subsequent marriage and birth of a child, should both concur, but that the birth of a child alone, in connection with other circumstances, might be sufficient to raise an implied revocation. (*Johnston vs. Johnston*, 1 *Phill.*, 447; *Marston vs. Fox*, 8 *Ad. & E.*, 14.) There is so much sound wisdom and natural equity in this conclusion, that it has been received very generally, and with various modifications been adopted in the statutes of nearly all the States, either to the extent of revoking the will entirely, or *pro tanto*, so as to let in the children born after the will was made.

Lord Mansfield (*Kenebel vs. Scrafton*, 2 *East.*, 541; *Brady vs. Cubitt*, *Doug.*, 31); and Lord Ellenborough considered the revocation as operating only when there was a total disposition of the estate; the nomination of an executor being taken, in analogy to the Roman law, as constituting such a total disposition so far as relates to personalty. But a will disposing only of personalty, and leaving the real estate to descend to the heir-at-law, would be revoked by marriage and the birth of children; and a will giving a few legacies, appointing an executor, and leaving the bulk of the personalty undisposed of, would also be revoked by the same events; and yet in each case there would be property descending to the heir or next of kin, as in case of intestacy. The rule originally prevailed in the ecclesiastical courts, by adopting the doctrine of the civil law, that the institution of an heir or executor was a total disposition; but as the executor is now bound to distribute

## BLOOMER vs. BLOOMER.

the residue remaining after the payment of debts and legacies, among the widow and next of kin, a will appointing an executor does not in reality dispose of the whole estate; and yet such a will would be revoked by marriage and the birth of children, according to the common-law rule. A will containing partial dispositions, therefore, may be revoked by such circumstances, provided an executor be nominated. May it not be justly asked, then, whether the question of revocation must depend upon a rule now entirely artificial—upon a mere form which has been stripped of its original quality, the total disposition of the estate, and now has no other force than to constitute a trustee for the benefit of those entitled to the succession?

There might be cases where so small a portion of the estate was disposed of by legacy or devise, that it would be unreasonable to imply an intention to revoke in case of the subsequent birth of children; and again, there may be cases where the whole estate is so nearly, but not entirely, given away, that the implication of intention to revoke in case of the birth of children, would be very strong. This question might become important under the laws of this State, which have let in a posthumous child to a share of the parent's estate, whether the disposition by will was partial or total; but not having subjected a *donatio causa mortis* to the operation of the same provision, a man might marry, have no children, and make large dispositions by gifts *causa mortis*, perhaps exhausting his property, and yet a posthumous child be without remedy, unless on the doctrine of an implied revocation.

Gifts *causa mortis* are of a mixed nature: they partake of the character of gifts *inter vivos*, from delivery, which is essential to their validity; and yet this single feature, assimilating them to ordinary donations, merely characterizes the mode of the thing, and not its type and quality.—Though in form they are gifts,—so in fact are legacies; the difference being that in the former case there

## BLOOMER vs. BLOOMER.

must be delivery, and though the gift may be resumed by the donor taking possession, it cannot be revoked by a will, but is claimed against, and not through, the executor or administrator. The truth is, a will under our laws, is substantially a *donatio mortis causa*, that is, a gift to take effect on death, the donation being completed by the act of the executor or administrator. A real *donatio causa mortis* is made, by the donor being his own executor. There is no difference in the nature of these things, but only in the incidents flowing from the method of giving title. A *donatio mortis causa* has the substantial qualities of a legacy in being ambulatory or revocable. Its completion is conditioned or contingent upon death. It may be reclaimed or revoked during the donor's life. It is subject to the debts of the deceased, and, in England, has been declared by statute to be liable to legacy duties. (*Bunn vs. Markham*, 7 Taunt., 231; *Drury vs. Smith*, 1 P. Wms., 406; 2 Vesey, Sen., 434; *Tate vs. Hilbert*, 2 Vesey, Jun., 120.) In one of the earliest cases, Lord Cowper, in defining this gift, says, if the donor "dies, it shall operate as a legacy." (*Hedges vs. Hedges*, Prec. Ch., 269.) By the civil law, if the donee died before the donor, the gift lapsed (*Inst., Lib. 2, Tit. 7, § 1*). Before the time of Justinian, there was some doubt as to the true character of these donations, some classing them with last wills and legacies, others with donations *inter vivos*; and to resolve this, it was determined they should be treated as legacies. *Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia.* (*Inst., Lib. 2, Tit. 7, § 1; Cod., Lib. 8, Tit. 57, § 4*). It also appears that by the civil law, donations *inter vivos* were revoked if the donor had no children, and happened to have children born to him afterwards. (*Cod., Lib. 8, Tit. 56, § 8; Domat, § 8; 2 Burge, Com., 147*.) By the French code, ordinary donations are absolutely revoked by the birth of children. (2 *Burge*, 205.) In the State of Connecticut, by the law of which State this ques-

## BLOOMER vs. BLOOMER.

tion must be determined, the statute has adopted the broad rule, that "a will" is revoked by the birth of a child if no provision is made in the will for that contingency. It is not necessary that the will shall dispose of the whole estate. All wills are revoked by the birth of a child—all legacies—all testamentary dispositions, total or partial. (*Revised Statutes of Connecticut*, 1849, *Title xiv, Ch. 1, § 6.*) Having recognized this rule in relation to written bequests, the same principle may justly be applied to donations *causâ mortis*, a form of gift in view of death, by no means of so solemn and deliberate a character as a will.—In the nature and reason of things, there seems no substantial ground for not applying the same principle to unwritten as to written legacies, so far as relates to an implied revocation by the birth of a child. Having attained the point that by the law of the testator's domicil, a total disposition is not essential for the application of the doctrine of implied revocation, there is nothing in the way of applying that rule alike to gifts in view of death, by parole and delivery, or by written instrument. I am of opinion, therefore, that the claim made on the ground of this alleged *donatio mortis causâ*, should be rejected.

It appears that, before the will was denied probate in the State of Connecticut, the executrix, acting under the directions contained in the will, paid out of the personal estate, a mortgage on some lands at Greenwich. This payment having been made in good faith (2 *R. S.*, *p.* 63, § 38, *p.* 78, § 46, *p.* 79 § 47), must be allowed, and the legatees and next of kin will have their claim against the land, for the sum so paid.

## HARRING vs. COLES.

## HARRING vs. COLES.

*In the matter of the guardianship of HENRY COLES.*

A TESTATOR gave his property equally among his children, directing that the shares of his daughters should be invested independently of any control of their husbands, but "the same shall be and accrue, solely and exclusively, to the benefit of my said daughters and their lawful issue." One of the daughters having died, leaving six children surviving, *Held* that on the subsequent decease of one of the six, intestate, leaving no descendant or widow, the father, after administration, was entitled to her share.

Where the father was guardian of his children, and, possessing limited means, was compelled to labor for their support, and in consequence of the decease of their mother was put to increased expense, *Held*, that it was reasonable under the circumstances, to charge a portion of the expense for their maintenance upon the income or interest of the shares of his wards.

W. A. SEELY, for Petitioner.

S. W. JUDSON, for Guardian.

I. Henry Coles, as sole surviving parent of Henrietta Coles, deceased, is entitled to the whole of her share of her mother's estate. (2 *R. S.*, p. 160, 3d ed. (marg. p. 97), § 79, sub. 7.

1. A guardian has a right to appropriate the whole income of his ward towards her support, maintenance, education, &c., and this for past as well as present and future maintenance. (*In the matter of Bostwick*, 4 *John.*, Ch. R., 100; *Wilkes vs. Rogers*, &c., 6 *Johns. R.*, 566; *DePeyster vs. Clarkson*, 2 *Wend.*, 77; *Hopk.*, 424; *In the matter of Davison*, 6 *Paige*, 136; *Bradley vs. Amidon*, 10 *Paige*, 235, 240, 242, 243; *In the matter of Ryder*, 11 *Paige*, 185, 187, 188; *In the matter of Kane*, 2 *Barbour*, p. 375; *Myers vs. Wade*, 6 *Randolph's R.*, 444 (Va.); *Foreman*

## HARRING vs. COLES.

vs. *Murray*, 7 *Leigh*., 412 (Va.); *Davis* vs. *Harkness*, 1 *Gilman*, 173 (Ill.); *Anderson* vs. *Thompson*, 11 *Leigh*., 439 (Va.); *Jackson* vs. *Jackson*, 1 *Grattan*, 143 (Va.); *Hooper* vs. *Royster*, 1 *Munford*, 119 (Va.); *Long* vs. *Norcom*, 2 *Iredell's Ch. R.*, 354 (N. C.); *Whitledge* vs. *Callis*, 2 *J. J. Marshall*, 403 (Ky.); *Chapline* vs. *Morse*, 7 *Monroe*, 150 (Ky.); *Davis* vs. *Roberts*, 1 *Smedes & Marsh, Ch. R.*, 543 (Ky.)

2. The principal may also be appropriated towards support and maintenance; but in general, application to the court is necessary for this purpose, except under extraordinary circumstances, as will appear from the foregoing cases.

In the present case, the guardian has not expended the principal, and does not claim it.

3. A Court of Chancery has no power to order or compel a parent to support his child. (*Matter of Ryder*, 11 *Paige*, 185.)

II. A common-law liability of a father to support his infant children, is recognized generally in the cases upon the subject; but this liability is usually limited or restricted to a *necessary* maintenance only; and in all cases an allowance out of the separate estate of the infant, is granted, unless the father has ample and unquestionable means for such support: such allowance is made, as a matter of course, out of the income of the infant's estate, but not out of the principal without application to the court.

The following cases will show the general rule of law upon the subject of a person who stands in the relationship of *father* and *guardian* to his infant children. (2 *Kent's Com.*, 7th ed., p. 181, 182, *marg. p.* 190, 191, 2, *notes d., &c. &c.*; *Newport* vs. *Cook*, 2 *Ashmead*, 332.) The rule as to the father's obligation to support his child, has become considerably relaxed. (2 *Kent.*, 181, 190, 2 *Ashmead*, 332, 339, 340, *as above*), 2 *Barb. Ch. R.*, 375, 377,

## HARRING vs. COLES.

379, 380, *In the matter of Kane*. In this case, the father was of sufficient ability, worth \$25,000, resided in the country; yearly income, \$500, and besides this, allowed annually by his mother, \$2,000,—amount \$2,500; only 2 children, pages 375, 76; decided father entitled to *some allowance*, &c., p. 381. (*Addison vs. Bowie*, 2 *Bland's Md. Ch. R.*, 606.) Wm. Bowie's estate, worth \$22,433.33, p. 613; had three or four children, pages 608-9, 613; principal decision, p. 627. (*Cunningham vs. Cunningham*, *Virginia*, 4 *Grattan*, 43.) This was the case of a *mother*. Allowance made, although accounts not regularly kept, &c. Reasonable allowance.

1. The guardian, H. Coles, expended \$1,200, principal, of his own property, over and above all his income, for the maintenance of his wards. And he has contributed towards the maintenance of the said Sarah B. Coles, now Sarah B. Harring, out of his own estate and income, in the ratio of \$71 14 to \$53 86.

2. There having been so many wards, in the relation also of children, namely six, and five living, is a fact to be taken into consideration before imposing upon one surviving parent, of very moderate and limited means, the whole maintenance.

3. The deceased wife of Henry Coles, never having enjoyed or derived any income from her father's estate, it is but just and reasonable upon principles of equity, that the income therefrom, after her decease, should be appropriated towards the support, &c., of her minor children and heirs-at-law, of whom the said Sarah B. Harring is one.

4. As to Commissions, see *Rapalje vs. Norworthy*, 1 *Sandf. Ch. R.*, 399; *Vanderheyden vs. Vanderheyden*, 2 *Paige*, 287.

THE SURREGATE. Upon the settlement of the account of the guardian, some charges were objected to as improper. The guardian is the father of the ward, and sup-

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HARRING vs. COLES.

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ported and maintained her from the date of his appointment, October 29, 1842, to the time of her marriage. The entire estate of the daughter consisted of one-sixth of the sum of \$4,937 76, that being the amount of the interest of Mr. Coles's deceased wife in the estate of her father, and which on her decease passed to her six children. The share of each child, then, was \$822 96, and the interest on this about fifty-seven dollars a year. Four thousand five hundred dollars of the entire amount were secured by mortgage, given by Mr. Coles in the lifetime of his wife, to the executors of her father's estate.

1. One of the children having died intestate, under age, and without issue, it is now insisted that her share fell to her brothers and sisters. The will of William Bell, from whom this property was derived, directed the sale of his property, and the equal division of the proceeds among all his children. Then followed this clause: "It is however, my further will that the share of each of my said daughters be invested by my executors, in safe securities, for the benefit of my said daughters. It being my express intention that neither of the husbands of my said daughters shall have or exercise any control over their said respective shares, but that the same shall be and enure solely and exclusively to the benefit of my said daughters, and their lawful issue. And I do hereby constitute and appoint my said executors to be the trustees of the shares of my said daughters." On the supposition that it was designed by this provision to limit the estate of Mrs. Coles to a life interest, and give the fund on her decease to her issue, it is obvious that when she died each of her six children became entitled to one-sixth of the fund. On the decease of any one of the children intestate, his or her share would become the subject of administration; and then, under the statute of distributions, if the deceased left a father and no descendant or widow the father would take the whole. Where the intestate has an absolute

## HARRING vs. COLES.

vested interest in a legacy, rights of succession regulated by law cannot be defeated by general expressions of a wish or intention, which the testator has neglected to carry out by force of legal limitation. In the present instance, the share of a grandchild dying intestate, under age, and without issue, might have been limited over to the brothers and sisters. This has not been done, and the share must therefore abide the course of distribution provided by law. But besides this, I think, on a fair construction, this clause of the will is not indicative of any intention to control the shares of the children, but its only design was to protect the interests of Mrs. Coles against marital interference.

2. Mr. Coles asks that an allowance be made to him for the maintenance of his children, by way of offset against the charge of interest. Under the circumstances I think it just to allow it. His means were moderate; he was compelled to labor for his livelihood, and for the support of a family of six children, deprived of a mother's care, and requiring on that account more of his time, and calling for a larger degree of expense. It appears that he reared, clothed, and educated his children in a suitable manner; and I do not think it at all unreasonable to allow a portion of the expense of their maintenance, unless there be some insuperable legal objection. The interest of the sum belonging to his children, was not sufficient for their support; and the expense of a good education alone, was enough to consume nearly the whole income of the fund, after the children had arrived at the proper age for attending school. Whether or not an allowance should be made, must depend upon a just consideration of all the circumstances, having reference primarily to the father's ability, and the extent of his fortune. (*In the matter of Kane, 2 Barb., C. R., 375.*) I am satisfied that, except during the last two years of his guardianship, it is just that Mr. Coles should have the interest on the share of Mrs. Harring, for her maintenance,—his ability previous to that

## WATERS vs. CULLEN.

period, to support his family, being, to say the least, doubtful. He must therefore be directed to pay the principal sum, with interest from July, 1848, less the sums proved to have been paid directly on account of his ward, as testified to by her husband. Costs are not to be allowed to either party.

## WATERS vs. CULLEN.

*In the matter of proving the last Will and Testament of  
BRIDGET CULLEN, deceased.*

MARRIED women, by the act of 1849, are competent to devise and bequeath real and personal property in the same manner and with the like effect as if they were unmarried.

The operation or effect of the will, on the estate or rights of the husband in the property of the wife, cannot be considered on the probate.

It is the duty of the Surrogate, on proof of due execution, to admit the will to probate, leaving the question as to what passes under the instrument, for future construction.

The power to make a will relates to the personal capacity and the probate: the right to dispose of certain property relates to the effect of the instrument when proved, and its construction.

An unequal will, made by a decedent who for some time before her death had been subject to attacks of *delirium tremens*, and at the time of making the will was under delusions likely to affect her testamentary provisions—rejected.

W. C. FREEMAN, *for executors.*

J. B. SCOLLS, *for next of kin.*

I. The testatrix was not of sound and disposing mind and memory, at the time of the execution of the will. (*Dean's Med. Juris.*, p. 563.)

II. The will is not entitled to any favor. It makes an unfair and unnatural distinction between her children, and entirely cuts off those who most need the small pit-

tance that would come to each child upon an equal division of her property,—the youngest infants.

III. The property devised was purchased by the testatrix when a widow. It did not come to her from her former husband.

IV. Bridget Cullen was legally incompetent to make a will, she being a married woman, and having intermarried with Dominick Cullen, on the 24th April, 1847.

By the laws in existence at the time of the marriage, a married woman could not make a will, and the absence of this power on her part, vested the husband with certain rights in case of survivorship; that of administering upon her estate, &c.

These rights Dominick Cullen acquired on the 24th of April, 1847, by his intermarriage with Bridget Cullen, then Bridget Briody.

Could the Legislature by a law passed in 1849, divest him of those rights, by granting to his wife the right to make a will?

We insist that the third section of the act of April 11th, 1849, is *prospective* in its operations :

1st. It is a fundamental principle, that all statutes are so to be construed, if possible. They are never to have a retrospective operation, unless any other construction would violate their letter and spirit. (*Danks vs. Quackenbush*, 1, *Denio*, 128; and 3 *Denio*, 594, *affirmed in Court of Errors*.)

2nd. Whenever it is intended that “women now married” shall be affected by the provisions of any section, it is expressly stated in such section.

3rd. It cannot be construed otherwise than prospectively, without affecting existing rights. To construe the statute so as to give women then married the right to make a will, would be to affect rights which the husband acquired by the marriage contract, and thus make *this* section of the statute retrospective in its operation.

If no other than a retrospective operation could be given to this section of the statute, it would be unconstitutional and void, so far as it undertook to interfere with the existing rights of the husband.

This view has been taken of the statute in question by several of our judges. We refer to the following cases:—(*Snyder vs. Snyder*, per *Harris, J.*, 3 *Barbour*, 621, *Holmes vs. Holmes*, per *Barculo, J.*, 4 *Ibid*, 296, *White vs. White*, per *Mason, J.*, 4 *Howard Pract. R.*, 103.)

THE SURROGATE. The decedent was a married woman, and as her marriage took place before the passage of the act of April 11, 1849, her competency to make a will is denied on the ground that the act in question is prospective in its operation, was not designed to give the power of devising to women then married, and that if so designed it was unconstitutional and void, so far as the rights of her husband were concerned. The language of the statute is certainly very broad:—"any married woman . . . may devise real and personal property . . . in the same manner and with like effect as if she were unmarried." On the supposition that marriage is such a contract as makes all the laws relating to the property of husband and wife, existing at the time, a part of the contract, so that the Legislature cannot repeal or modify them even in respect to property to be acquired after such change of the law—even on that hypothesis, I cannot see that that operation or effect of the instrument on the rights of the husband can be set up against the proof of the will. For example, the will may not touch the supposed rights of the husband at all—but may only give what the wife has an undoubted right to give, such as an estate in fee in lands, of which the husband is an acknowledged tenant by the curtesy. It is obvious that the bearing of the will upon the rights of the husband is a question of construction. As the law now stands, all married women have the capacity to make a

## WATERS vs. CULLEN.

will; they are clothed by the statute with testamentary power; and it is the duty of the Surrogate, on proof of the due execution of the instrument to admit it to probate. What real or personal property passes by the will, and what does not, is clearly a matter which has nothing to do with the probate in this class of cases, more than in any other. As it would be an extraordinary and novel objection to make to the proof of a will of a male, that it undertook to give property not belonging to the testator, so, it is quite as incongruous to urge, as an objection against the proof of the will of a married woman, that it disposes of property belonging to her husband by virtue of his marital right. The power to make a will is one thing, and the power to dispose of certain property another. The former relates to the personal capacity and the probate—the latter to the effect of the instrument, when proved, and its construction.

The will now under consideration is contested on another ground, which I think fatal.—The decedent died of *delirium tremens*, to which disease she had been subject more or less for some time before her decease. She gave her property, consisting of a house and lot in this city, to her children by her first husband, and left her children by her last husband penniless. It appears that she advanced as a reason for this, that the property in question came from the estate of her first husband. It is also shown that at the time the will was executed, she believed that she had been poisoned by the father of the children she left unprovided for. Delusions of this kind are common in cases of *delirium tremens*; and there is nothing in proof, to show in the present instance that there was any possible ground for the suspicion she entertained. Nor has any evidence been offered to establish the derivation of the property she devised, from the estate of her first husband. These delusions were material; for a person resting under them might possibly be led to give the estate to one set of

## WATERS vs. CULLEN.

children to the exclusion of the other. It is necessary, indeed, to search for some such reason, in order to comprehend how a dying mother could leave offspring of a tender age entirely destitute, and prefer children more advanced in years and better able to sustain themselves. It is true the subscribing witnesses, both of whom were competent judges to the extent of their means of observation, were of opinion that her mind was sound; but they had never seen her before the instrument was executed, and had but a limited opportunity of ascertaining the state of her mind. Her attending physician thinks he was present the evening the will was said to have been executed, between 11 and 12 o'clock; but the subscribing witnesses did not see him; and he is probably mistaken as to the time, for the will is dated the 20th of December, she died on the 8th of January, nineteen days after, and yet he thinks the will was executed two or three days before her death. The doctor, however, testifies very explicitly that the state of her mental faculties varied from time to time,—“sometimes very clouded, and at other times she would be perfectly possessed of them.” . . . “Very variable throughout the whole time.”

Mr. McKiernan, who called in the lawyer to make her will, without the directions of the deceased, gave some particulars of the symptoms of her disease. He expresses the opinion that she was insane. He states that for a month before the execution of the will she would at times shew signs of mental aberration, saying her husband had poisoned her—shouting out for the doctor—running out undressed into the entry—exclaiming that there were people in her room—that there was something in her throat—wishing a quill to be put down to remove it—and fancying that there were devils coming down out of the ceiling. The afternoon of the day the will was made, she was out in the entry undressed, crying out for a doctor; and when he returned with the will in the evening, she was calling for

the doctor, and talking about the place in her throat. Her daughter went to her bed-side to quiet her, saying "that the lawyer was there with the will;" and McKiernan did the same. It is observable that McKiernan first observed her mental disorder, when she told him she had been poisoned by her husband. And it appears from the evidence of the subscribing witnesses, that at the time of the execution of the will, her countenance was flushed and bloated,—she wanted her doctor, was vomiting and retching, and had evidently been taking liquor; so that Mr. Martine says that if she had not stated that she had been poisoned by her husband, he would have supposed her sickness had been produced by liquor. The facts observed by the subscribing witnesses were not sufficient to authorise their entertaining the belief that she was intoxicated, or under the influence of *mania à potu*. But with the additional circumstances now brought to light—the evidence of the physician as to the character of her disease, and that of McKiernan as to distinct acts of wildness of conduct and speech—the fact that on that very afternoon she had left her bed and gone into the entry—that at the very time of the execution, she was calling for the doctor, talking about her throat, and accusing her husband of poisoning her,—with all these additional circumstances it is impossible not to conclude that she was not in a fit mental condition to make a will. There is decided evidence of delusion; and although from the peculiar character of her disease this did not shew itself on points likely to attract the attention of the subscribing witnesses, yet with the proofs now afforded the Court, it is manifest these delusions were symptomatic of the species of *mania* with which she had, at intervals, been afflicted for a considerable length of time. I am of opinion, therefore, that the will should be refused probate.

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MAVERICK vs. REYNOLDS.

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## MAVERICK vs. REYNOLDS.

*In the matter of proving the last will and testament of  
REBECCA MAVERICK, deceased.*

THE testatrix, at the time of making her will, was ninety years of age; and the probate was contested on the ground of testamentary incompetency, and undue influence. It being shown the decedent was of sound mind; that the will was executed with publicity; that it was in harmony with an instrument made six years before, when her capacity was unquestioned; and likewise consistent with her intentions, often expressed before and after it was executed; that its provisions were reasonable; that when made it was carefully read and explained; and there being no trace of concealment, influence, or deception,—the will was admitted to probate.

Great age alone does not constitute testamentary disqualification; on the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials, are shown to have existed; and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness.

D. T. WALDEN, Jun., for Contestants.

THERE are two questions in this case.

I. Whether the deceased, at the time of the execution of the will, had a disposing mind, and memory sufficient to know her property, her kindred, and their claims on her bounty? (*Swinburne*, p. 72, 77. 6 Co., 23, in *Marquis of Winchester's Case*. *Rambler vs. Tryon*, 7 Serg. & R., 95. 1 *Peter's R.*, 164.)

II. Was any undue influence brought to operate on decedent, to produce this will in favor of one set of her grandchildren to the exclusion of others?

## MAVERICK vs. REYNOLDS.

1. As to capacity. There is a great mass of evidence, *pro* and *con*.

(a) The contestants produce Mrs. Townsend, Mrs. Osborn, Catherine Braman, Angelica Maverick, Dr. Pratt, Mrs. Johnson, Mr. and Mrs. Warner.

(1.) These prove, during a period between 1847 and 1850, loss of memory, childishness, and incapacity to attend to her business affairs, although at times she may have spoken and conversed rationally.

(2.) Three of these, Mrs. Osborn, Catherine Braman and Angelica Maverick, prove her statement to the effect that she would provide by her property for her other grand or great-grandchildren.

(b) The executor has examined Dr. Berrian, Dr. Maxwell, James Stokes, Mr. Wykoff, Mr. Dugan, Mr. Nexsen, Maria and Margaret Johnson, James T. Griswold, Ann Maria Griswold, and Mrs. Torboss.

(1.) These prove the character of the decedent's mind and memory up to 1848, when she left Liberty Street; but know nothing of it since, except Mrs. Torboss, who swears to two instances, one in 1848, and the other in 1850.

(2.) The witnesses who speak of her since 1847, or February, 1848, are Joel M. Johnson and Ellen Conklin, who met her at Godwinville, New Jersey, one for about ten days, and the other for about five or six days; Dr. and Mrs. Hilton, Mr. and Mrs. Burke, Mrs. Everett, Mrs. Wheeler, Thomas Townsend, Mrs. Nellis,—and Mr. Dewey, and Miss Phillips, the witnesses to the will.

While the opinion of witnesses on facts stated is competent evidence, still their force and value depend on the general intelligence of the witness,—the grounds upon which the opinion is based,—the opportunities for accurate or full observation,—and on his entire freedom from interest or bias, or prejudiced state of mind. (*Clark vs. Fisher*, 1 *Paige*, 171, 173, *Culver vs. Haslam*, 7 *Barb. S. C. R.*,

## MAVERICK vs. REYNOLDS.

314, 325, *per Willard, J. De Witt vs. Barley*, 6 *Law Reporter, U. S.*, p. 33, *May No.*, 1853.)

We desire that the evidence of the witnesses shall be thus tested :

1st. Dr. and Mrs. Hilton, Mr. and Mrs. Burke, Mrs. Everett, Mrs. Wheeler, and Mrs. Phillips, are all near relatives and connections of Mr. Reynolds, the executor, and of the devisees under the will,—biased and prejudiced to shield the one and assist the others.

Mr. Dewey is a law associate ; Thomas Townsend, operated upon by some interest—the hope of favor from the executor's position in other matters.

2d. The opportunities for accurate and full observation.

Where were there better, than of those with whom the testatrix lived, and who were in daily intercourse and association with her ? How much greater the opportunity, than of those who saw her but occasionally—at long intervals—and then but for a short period of time !

Take, for instance, the testimony of Mrs. Torboss, Mr. Nexsen, Mr. Dugan—how is their evidence as to capacity after February, 1848, to be viewed in comparison with that of Dr. Pratt, Mrs. Townsend, and Miss Maverick ?

(c) While old age may not in itself incapacitate the testatrix, still, when taken in connection with severe sickness just previous, and the other facts in the case, it strengthens the testimony of the contestants. (*Turner vs. Turner*, 1 *Littell R.*, 102.)

(d) There are other facts which, as evidence produced by the executor, prove that there was want of capacity of deceased to attend to her own affairs, to contract for her own board, to pay her own bills, or even to receive her own money.

Where a person is under guardianship as *non compos*, the presumption is that he is incapable of making a will. (*Breed vs. Pratt*, 18 *Pick.*, 115.)

(1.) The power of attorney executed March, 1848, is in

## MAVERICK vs. REYNOLDS.

effect letters of guardianship to Mr. Reynolds, of the estate of the deceased.

(2.) The receipts show that Mr. Reynolds paid her bills, managed her affairs, and held her estate in his hands.

(3.) The testimony of executor's witnesses shows that she would make no change in her boarding-place, or control her own person, without Mr. Reynolds' consent.

(e) The reason given by some of the executor's witnesses, as coming from deceased, why she intended to exclude the children of Samuel's first wife, is *inconsistent* with the idea that this same intention was held by deceased in 1842, before any provision was made by Mr. Aaron Howell.

That will was more reasonable than the one now offered for probate, because her son was then living; yet even that may show the hand of the executor, Philip Reynolds, and may have been produced by the same influence as this.

(f) The statements of executor's witnesses as to declarations of deceased in regard to the disposition of her property, are in many respects conflicting. In one or two instances, it is said that she intended to equalize the property among the children. Mr. and Mrs. Burke contradict each other; one says it was in the summer of 1849, the other sometime in November.

(g) The children of Samuel's first wife received about \$1,000 each; this was all their *children* had,—many of the contestants are great grandchildren of deceased.

The children of Clara received their mother's property.

## II. As to the influence in producing the will.

(a) The will was drawn by Mr. Reynolds.

(b) He was her legal adviser, and in effect the guardian of her person and estate; and she trusted and confided entirely in him.

The law looks with great jealousy upon devises obtained in this way, and will not sustain them without the clearest evidence of free will in the disposition that is made.

## MAVERICK vs. REYNOLDS.

(*Crispell vs. Dubois*, 4 Barb. S. C. R., 393, *Barry vs. Butlin*, 1 Curteis Ecc. R., 637; 2 Phill., 323.)

(c) The will was executed in the presence of the sister of the executor's wife, and his law-clerk. The presence of other persons in an adjoining room cannot add strength to the will, as at the time of execution decedent was excluded from them, and only in the presence of her guardian, his relative, and his associate.

(d) The person who drew the will had control of her property, is the executor under it, and the *devisees* are his *nephews*.

(e) There is no evidence of instructions to draw this will.

(f) The evidence that the deceased understood the will when read to her is doubtful; at least her asking questions at the time is evidence that she did not understand it.

There is a conflict between the attesting witnesses, as to how often the will was read, and what the deceased said at the time. Miss Phillips says, that she asked Mr. Reynolds if it was right.

(g) This is sustained, by the evidence that she afterwards declared her ignorance as to what was in the paper she had signed.

III. If the contestants shall have failed to prove either sufficient want of capacity or sufficient undue influence, when standing alone, yet the combination, in a less degree, may be sufficient to invalidate the will, and induce this court to pronounce against it. (*Butler vs. Benson*, 1 Barb. S. C. R., 538. *Sears vs. Shafer*, *Ib.*, p. 412, 413, *per Barculo, J.*)

## MAVERICK vs. REYNOLDS.

P. REYNOLDS, *Executor, in Person.*WM. C. FREEMAN, *for Executor.*

I. The paper offered for probate was executed as required by the statute.

II. The decedent, at the time of executing the will, was of sound and disposing mind and memory, and in all respects legally capable of making a will.

The law presumes, that the testatrix at the time of executing the will was sane. Insanity must be proved. (*Peters, C. C. R.*, 162.)

Old age raises no presumption against the capacity of the testatrix. Incapacity must be proved. (*Swinburne, Part 2d, § 5, Van Alst vs. Hunter, 5 John. Ch. R.*, 148; *Bleecker vs. Lynch, 1 Bradford*, 458; *Lessee of Hoge vs. Fisher, Peters, C. C. R.*, 163.)

The testimony on the part of the executor, shows *capacity before, and at the time, and after making the will*; and the contestants have failed to destroy or weaken this testimony. The mere fact of being unlearned or illiterate does not incapacitate a person from making a will. (*5 John. C. R.*, 148; *26 Wend.*, 255.)

Physical suffering of itself is no evidence of incapacity; unsoundness of mind and memory must be connected with it, to create a legal incapacity. (*Voets' Com. on Pandects, lib. 28, title 1, § 36.*)

Imbecility of mind, apart from idiocy or lunacy, is no evidence of incapacity. (*3 Denio*, 37: *21 Wend.*, 142; *24 Ib.*, 85.)

Defect of memory, *unless total*, or it appertains to things *essential*, will not establish incapacity. (*Bleecker vs. Lynch, 1 Brad.*, 458; *Martin Silbers' Will, 2 Ib.*, 133; *Stevens and Wife vs. Vancleve, 4 Wash. C. C. R.*, 262.)

III. The testimony does not show that undue influence or clandestinity was used to procure the making or execu-

## MAVERICK vs. REYNOLDS.

tion of the will. Facts and circumstances must be proved, showing undue influence, to raise or warrant a presumption of unfairness in the transaction. (1 *Brad.*, 458; 3 *Denio*, 37; 22 *Wend.*, 526.)

IV. The provisions of the will are consistent with natural affection, and in conformity with the intentions of the decedent.

THE SURROGATE. Mrs. Maverick, at the time of making the will offered for proof, was 90 years of age; and the probate is contested on the ground of testamentary incompetency, and undue influence.

She had one son, Samuel Maverick, who died in 1845. Samuel's first wife was Mary Howell; and his second wife Clara Reynolds, a niece of the decedent. The will gives all the estate of Mrs. Maverick to the four children of Clara, to the exclusion of the children and grandchildren of Mary Howell. Samuel's children by his first wife received from their grandfather Howell, about \$1,000 apiece. The four children by the second wife receive by this will of their grandmother Maverick, one-seventh of the House No. 85 Liberty Street, in the city of New York.

This old lady had resided with her son and her daughter-in-law, many years, at No. 85 Liberty Street.

On the decease of Clara, Feb. 22, 1848, the establishment was broken up, and she removed to Troy Street, where she boarded with Mrs. Townsend.

In June, 1842, she made a will, wherein, after giving a few trifling legacies, the largest of which was fifty dollars, to her granddaughters by Samuel's first wife, she devised the bulk of her estate to her son Samuel, and in the event of his death previous to her decease, to his wife Clara. As this will provided for the contingency of Samuel's death, it does not appear to have been disturbed when that event happened. Clara's decease, however, rendered it almost

## MAVERICK vs. REYNOLDS.

entirely nugatory. Accordingly, another will was executed within four months,—giving the estate which would have passed to Clara, under the previous will, if she had lived, to her children.

The decay of the human faculties, frequently consequent upon old age, is usually gradual, and often so imperceptible that it becomes necessary to select certain intervals or distances of time as points of observation, in order to mark its progress with accuracy. Where there are no marked stages of mental failure, the beginning cannot be traced; though, as infirmities increase, the indications of a broken and enfeebled intellect become manifest and decided. It is especially in such cases of gradual decline, we should guard against a common tendency of the memory to carry its present or recent impressions, derived from continued habitual observation, to an undefined period of time; and thus to judge rather from present opinions than from recollected facts. The witness for the contestants, who enjoyed the best opportunities, during the last years of the life of this old lady, of observing the state and condition of her mental faculties, was Mrs. Townsend, with whom she boarded. There being no doubt that, before her death, Mrs. Maverick's memory became seriously impaired, it is important to ascertain, with reasonable precision, whether Mrs. Townsend can specify with certainty any positive indications of mental infirmity previous to the execution of the will. The testimony of this witness opened with a general statement, which, upon more critical inquiry, became much modified. She expressed broadly the opinion, that the old lady was very imbecile—quite a child in every respect—when the will was executed. Mrs. Maverick came to live with her in March, 1848, and the will was executed in June following, about three months after. She says, "Her mind was much clearer when she first came than afterwards, but still I don't think she had much mind." . . . "I think the faculty mainly impaired was her memory."

## MAVERICK vs. REYNOLDS.

Upon further inquiry, Mrs. Townsend admits that her memory was not all gone, and that in regard to events which occurred in early life, she spoke with clearness and intelligence. Finally, the only point she was able to specify as indicative of loss of memory prior to the execution of the will, was that she forgot the decease of her son, Samuel, and his wife, Clara. "She never from the first appeared to remember that her children were dead." "With this exception, I don't think I recollect any other circumstance indicating childishness, loss of memory, or imbecility, before the execution of the will." It is not at all improbable that Mrs. Townsend, after the lapse of several years, may be mistaken as to the time when this circumstance occurred, especially as there was no connecting fact to fix the date. The memory of the witness failed in other particulars quite as likely to be impressed on the mind; one occurring shortly before, and the other shortly after the execution of the will. She forgot that she was the subscribing witness to a power of attorney executed by the decedent in March, 1848; and she post-dated, a whole year, a visit made by Mrs. Maverick to New Jersey, in July, 1848. On the other hand, Mrs. Townsend states circumstances tending to show that the old lady was not an utter imbecile. She says that she would often speak about her house in Liberty Street, and inquire in respect to the collection of the rents, and the alterations then being made in the premises. In April, after her sickness, and not before as Mrs. Townsend supposed, when Mr. Reynolds accounted with her for the sales of her furniture, she missed several articles, and called his attention to them. She often went out alone to see her friends. She went to the part of the city where she had formerly lived, and found her way around alone. She went to Mr. Reynolds' office alone, three or four times in the first year. She did her own mending, for a year. She made some quilts. She generally made her own purchases. Her sight was defective,

## MAVERICK VS. REYNOLDS.

though good for her years. Her hearing was not at all affected. She was fond of hearing fictions and the newspapers read to her, and the Bible. She attended church once a day on Sundays. She did not forget Mrs. Townsend, or Mr. Reynolds, or any member of their families.

Mr. Ellsworth testified that, eight or nine years since, the deceased was run over in the street, and since that he thought she had become childish and simple in her conversation; he was unable, however, to recall any circumstance justifying this opinion.

Mrs. Osborn, who saw Mrs. Maverick frequently from 1837 to 1840, stated as instances of her bad memory at that time, that she forgot to pay her a dollar she had borrowed; was in the habit of making statements, and afterwards denying that she had made them. This witness considered the old lady childish; but this seemed to be her way of generalizing about aged people, for she says, "She was like all other old people, eighty years old; we consider them childish." She met the decedent eight years ago in the street, and she told the witness who, though not recognized, addressed her, that she had lost her way. With the exception of this single interview, the witness had not seen her for over eleven years.

Catharine Braman also thought the decedent childish. She had seen her but three times in eleven years. She stated the circumstances which occurred at the first two interviews; but I think them immaterial. The last interview was eighteen months after the execution of the will, and is therefore unimportant.

Mrs. Johnson thought her memory "very poor," though "her conversation was very good." Her acquaintance with the decedent commenced in 1848, and she only met her casually; and it was not at all remarkable that Mrs. Maverick "could not remember her from one week to another."

Mr. and Mrs. Warner saw the decedent in the summer

## MAVERICK vs. REYNOLDS.

of 1848, and were of opinion that her mind and memory were failing, because she repeated the same questions after they had been answered.

Angelica Maverick, Mrs. Townsend's sister, testified to many circumstances showing mental imbecility. For example, she states that in 1848, the decedent spoke of having been run over, a fortnight before. She also says Mrs. Maverick could not distinguish between her husband, son, and step-son; would frequently inquire whether her husband was living, and speak of her son as though he were her husband, forget he was dead, or ask if he was living. It does not appear with precision when these facts occurred. On the other hand, the witness states that the decedent in 1848 made some purchases, generally went alone to Mary Maverick's, in Carmine street, and sometimes alone to church. She spoke of her house, in Liberty street, and the rents; and in the fall of 1848, the witness thought she had mind enough to make a gift of \$20 to Mary Maverick. The witness was present at the execution of the will, and says it was read in such a hurried manner, she could not understand it. The subscribing witnesses testify that it was read with deliberation. She also stated that the fire at Mary Maverick's house, in Carmine street, occurred, she thought, in 1849, but did not recollect; could not say at what period of the year, whether it was before or after the will was made, though she thought it was about that time. She had forgotten that in 1849 Mr. Reynolds paid money to the decedent in her presence, though on being shown the receipts of two payments she admitted she had signed them.

Dr. Pratt, the medical attendant of Mrs. Maverick for the last ten years, testified to various circumstances showing decay of mind and memory; but he was quite clear she had sufficient capacity to make a will prior to a sickness at which he dates a decided failure in her mental powers. On his first examination he mentioned only an

## MAVERICK vs. REYNOLDS.

attack in the spring of 1848, from which he thought she recovered so as to get out the last of April or in May. After consulting his diary, and on his second examination, it appeared that in 1850 he was called in to see the decedent on the 20th of March, and visited her daily to the 29th inclusive; and also on the 3d and 15th of April. In 1848, he visited her nine consecutive days, and he states her disease was inflammation of the lungs. In 1850, he made twelve visits, extending over a period of 26 days, and yet had entirely forgotten it; and, though not certain, thought she had a disease of the bowels. The doctor also forgot that he had been paid a bill for attending Clara Maverick, and that he had been paid a bill for attending the decedent, in 1850. He admits likewise, "when asked about matters of four years' date, I am sometimes staggered about dates, unless I consult books."

On the other hand, the doctor stated that the deceased always knew him, to the day of her death, and that he never discovered any idiocy, but only the loss or failure of memory, till the last stages of her life. She often spoke to him of her house, the rents, and the loss of money by one Kirk, in 1848 or 1849. He met her alone in the street, in 1849, going to see Mrs. Torboss; also in 1850; on both of which occasions she spoke to and recognized him. He says that prior to his first examination he called on Mrs. Townsend, to refresh his memory and get dates, to save himself the trouble of examining his books. It may as well be stated in this connection that Mrs. Townsend testifies that the disease of Mrs. Maverick in 1848 was a violent cold and cough, and that she was confined to the house three or four weeks.

Mrs. Malcom, who was in the habit of seeing the decedent frequently, testified that she had not "heard her make use of a sensible remark in seven years, if not longer." "As long as I can bring my memory to bear, she has been childish, but not as much so formerly

## MAVERICK VS. REYNOLDS.

as during the last seven years. . . . In my opinion, she was childish twenty-five years ago. Her actions were generally childish. She would sing childish and foolish songs, and tell foolish stories which I considered unbecoming for a woman of her years, and the people would all laugh at it. I recollect the subject of one of these songs; that was 22 or 23 years ago. . . . Her memory was entirely gone. . . . Her conversation was childish, weak, simple, and unconnected. At the end she would not be conscious of what she was saying, and would repeat it. She would talk sometimes of getting married, of having a beau, that she was a young woman of thirty-two years of age, just ready to be married. Sometimes she would fancy she was making ready to be married." . . . "She forgot she had paid for purchases; and in two minutes after, you could make her pay over again; you could make her believe she had paid and had not paid. I hardly think that in seven years she was conscious of what she was doing. She would not know where she was going. If you would send her out, she would lose her way. She was generally accompanied by one of her grandchildren. I have taken her home, and by the time I got there she would not know who I was, would think I was a stranger; once I asked her to lend me an umbrella to return with, and she said she did not know me, and she would lose her umbrella," &c. Without stating more minutely, it is sufficient to say that the statements and opinions of this witness, if uncontroverted, are quite enough to show great imbecility. On inquiring into the dates of some of these circumstances, however, it appears that the refusal to lend the umbrella occurred within the last three years; another in respect to buying two new bonnets, within two or three years, and another in the fall of 1848. On her direct examination this witness stated, that the decedent "wore caps, with red, pink, and blue ribbons." On her cross-examination she said "she did not, but could be per-

## MAVERICK vs. REYNOLDS.

suaded to." She said, "her hand shook so she could not sew." Mrs. Townsend proves the reverse. She gave the idea that the decedent lost her way whenever she went out alone. This is contradicted by many witnesses. She says "she did not know where she was living, whether in Troy street or Liberty street; more than half the time, could not tell the lady's name she was living with." Other witnesses show she knew well with whom she was residing. She says, "she would not know her children or her grandchildren." She had no children, and it is proved she did know her grandchildren. She says, "you could not make her sensible, her son and grandson were dead." It is shown that as late as 1849, she did know her son was dead. She says that in February, 1848, after Clara died, she asked her where she was. Several witnesses prove she was quite sensible of the loss of her daughter-in-law, and made it the subject of conversation.

I will now consider the evidence in favor of the testamentary capacity of the decedent. Mrs. Malcolm was the only witness who undertook with any decision to question it, prior to the death of Clara Maverick, in February, 1848; but as her opinion respecting the childishness of the decedent previous to that time was quite as confidently expressed as in regard to her mental condition subsequently, it is of consequence, in judging of her correctness as to the latter period, to see how far the evidence in the case sustains her as to the former period.

The Rev. Dr. Berrian, whose church she attended before her removal to Troy street, states that he generally visited her once a year, and that he saw her during her sickness in 1842. Her conversation then, was devout and pertinent. He never observed any mental decay, but on the contrary, thought she was rather a remarkable person for her age.

Dr. Maxwell, who attended as a physician in Samuel and Clara Maverick's family from 1844 to 1847, test-

## MAVERICK vs. REYNOLDS.

ified that he never observed any indication of weak or unsound mind. He thought her about seventy years old, and on hearing her age, considered her a remarkable woman at that time.

Mr. Stokes, a neighbor for many years, thought she was a wonderful woman for her age. He left the neighborhood fifteen years ago, and since then has only seen her in the street. He had not met her for the last ten years.

Mr. Wyckoff knew her, from 1818 till she left Liberty street. He was frequently in the house, and conversed with her previous to Samuel's death. He thought her mind very good, and never discerned any failure.

Mr. Dugan knew the decedent over twenty years; was intimate in Samuel Maverick's family, and conversed with the old lady very frequently. He says, "I thought she was a remarkable, intelligent, smart woman. During the time I knew her, I discovered no change of intellect. Her memory was remarkably clear, and I considered her very smart for a woman of her age. My opinion was founded on general conversation, as well in regard to present as to former occurrences, and I never discovered any change in her intellect, from my first to my last acquaintance with her." His conversations with her, do not appear to have continued later than two years prior to Clara's death, though he saw her subsequently.

Mr. Freeman, who saw the decedent occasionally at Mr. Reynolds' office, from 1840 to 1842, and three or four times since, prior to Clara's death, expresses the opinion that she was a clear-headed old lady.

Mr. Nexsen boarded at 85 Liberty street, for a year, about 1841, and was very intimate in the family, to the time of Clara's death. He went up into the old lady's room when he called. He says, "I considered Mrs. Rebecca Maverick a very remarkable woman for her age, in respect to her mental capacity and everything. In respect to liveliness, she was almost like a young woman. I never

## MAVERICK vs. REYNOLDS.

saw an old lady of her age, who went around the house and about the street, as she did alone." . . "I never discovered any decay of intellect, or any change in her, during all my acquaintance. I spoke to her at Maria's funeral (April, 1848), and she remarked to me that her children were all going before her."

Maria and Margaret Johnson, who boarded at 85 Liberty street, in 1847, from June to October or November saw and conversed with Mrs. Maverick, frequently. They thought her very sensible; observed no failure of memory. She sewed, made her own bed, sometimes went out alone, spoke about her son Samuel, collected her own rents. Margaret Johnson spent nearly an hour with her the day before Clara died, and discovered no change of mind.

Mr. Griswold visited at the house frequently; and the latter part of 1847, and the first of 1848, to the time of Clara's death, very often. He thought her "an extraordinary woman, physically and mentally," and "never discovered any failure of memory." Mrs. Griswold was also a frequent visitor; and shortly before Clara's death, she was at the house very often—at all times of the day and evening. When Clara died, the old lady told her she had lost her best friend. She says, "In respect to her capacity, during all my acquaintance with the decedent, I thought her very remarkable. I never discovered any weakness of mind in her. I do not remember discovering any failure of memory." She also states that she frequently saw the deceased go out alone. Mrs. Nellis, an old acquaintance of Mrs. Maverick, stayed a couple of days with her at the house in Liberty street, after Clara's funeral. She slept with her. She said, "that when Samuel died, she had Clara left to take care of her; but now she is gone, I have nobody." This witness says her mind was good, and she never noticed any failure of memory.

Mrs. Torboss, for many years a neighbor of Mrs. Maverick, states that up to the time of Clara's death, "her mind

## MAVERICK vs. REYNOLDS.

and memory were very good." She called at the house of the witness that summer (1848), and said she was going to see her grandchildren in New Jersey. They had considerable conversation together, and the witness discovered no change of mind or memory. She saw her again in 1850, and then perceived her mind had failed.

Mr. Johnson, of Godwinville, New Jersey, testified that, in July and August, 1848, the decedent stayed some weeks with Dr. and Mrs. Hilton, who lived in the same house with the witness, at that place. He conversed with her frequently and at length, and mentions several of the subjects of conversation. He says, "She related a number of transactions that had occurred, with more accuracy than I had derived them from history." "I thought at the time she was a woman of remarkably strong mental powers, and that her physical developments were in a good state." "I did not discover the least appearance of decay of mind. I observed there was no incoherence in expression and language. She seemed to be very clear in her ideas and views, and I thought very distinctly clear in her expression of them. I don't think I discovered any failure of memory, in any of our conversations." "Philip and Clarkson Maverick, whom I understood to be her grandchildren, were boarding with Dr. Hilton at the time. She acted as if she knew them, and she took a particular interest in them. She gave me quite a full account of the pedigree and family connection; but I have no recollection of the matter, from the fact that it was so mixed up, I could not keep account of it." "She never told me the same story over again, without my calling up the subject. I don't remember her showing anything of that kind. She seemed to recollect distinctly what she had said—the conversation that had transpired." Mr. Johnson states that he thinks she returned to the city by railroad, alone; that she was fond of hearing the papers read, and interested in the news; that she spoke of the Pilgrim's Progress, and its style; alluded

## MAVERICK VS. REYNOLDS.

to the improvements in New York—the Croton water, and its advantages—the University, and the facilities for education—Trinity Church, its wealth, and the litigation as to its property—the loss of the steamer Atlantic, then a recent occurrence; and that she was as ready as he to lead off on all topics, and expressed herself with fluency.

Mrs. Concklin, who was staying at Mr. Johnson's house at the time of the decedent's visit, states that she came alone with a driver from Paterson. She saw her frequently, and thought her "a very smart woman for her age. I saw no sign of forgetfulness about her. I did not notice her telling the same story over again. . . . I did not hear her repeat any question she had asked. She recognized me whenever she saw me. When she asked after Mrs. Johnson, she would call her by name."

Thomas B. Townsend, a son of Mrs. Cornelia Townsend, who lived with his mother while Mrs. Maverick resided with her, states, in the most unqualified manner, that during the first year she lived in Troy street, "her mind and memory were good. They appeared to be always good during that year. I never noticed anything to the contrary. I make the same statement as to the year 1849. I think her memory was very good both years. It failed somewhat after we moved to Greenwich avenue, May, 1850, but not so much as during the last year of her life. It was scarcely to be noticed during 1850." Mr. Townsend says that he talked with the old lady more than any other member of the family; he accompanied her very frequently when she went out; and was in the habit of reading newspapers and books to her. He says, "Her conversation was sensible for the first two or three years after she came to our house. Her conversation was not silly or childish until the last year of her life. The principal thing, even then, was loss of memory, or partial loss. I can't recollect any the least failure of memory in 1848 or 1849." "I never observed that she failed to recognize any person in

## MAVERICK VS. REYNOLDS.

1848 or 1849 ; or that she forgot the names of any persons ; or that she repeated questions that had been answered. I can't recollect that she ever repeated the same story without being asked."

In addition to this evidence, there is the testimony of the two subscribing witnesses to the will, and of Mrs. Everett, Dr. and Mrs. Hilton, Mr. and Mrs. Burke, and Mrs. Wheeler. As all these—except one of the subscribing witnesses, Mr. Dewey—are connections of Mr. Reynolds, the executor, and of the children who are the beneficiaries under the will, I do not propose to examine their opinions in detail ; not from any doubt as to their correctness, but because the proof is sufficient without them. They state a series of facts, however, that are important.

Mr. Burke testifies, that in September, 1850, Mrs. Maverick came alone to No. 85 Liberty street, saying she had called to look at the house. She examined it, saw that the rear was cracked, and observed that it had been so for some years. He accompanied her to the residence of Mrs. Torboss, and afterwards called and saw her into a stage. She told him the line of stages, and how to mark them.

Mrs. Hilton states, that in the summer of 1848, at Godwinville, the decedent packed and unpacked her trunk, when she came and left. She dressed and undressed herself. She knew Samuel and Clara were dead ; was perfectly aware she was boarding with Mrs. Townsend. That in 1849, when the witness lived at the Dispensary, she came to the house alone, twice. That she never knew her to fail in recognizing any one ; and that on her death-bed she recognized her. Dr. Hilton says she knew him always, even to the last. Mrs. Everett states that to the time of Clara's death, she rented the house and collected the rents herself. That in June or July, 1848, the decedent visited her house ; and at that time spoke of the death of Clara and Samuel. Mrs. Wheeler testified she saw the deceased at the funeral of Maria Louisa Maverick (April 20, 1848), and that " she

## MAVERICK vs. REYNOLDS.

spoke of the change in the family in a few years, and that she had lived to bury them all." Mrs. Burke states that in February, 1849, at a dinner party at her house, the deceased spoke of the death of Samuel and Clara; and on the ensuing day, she accompanied her to the house of Mrs. Mary Maverick. She told the witness, who did not know the locality, it was in Carmine street, and went there with her, and identified the house without any difficulty. Mr. Dewey testified that, in 1848 or 1849, the decedent called at the office in relation to a claim she had against an old tenant; told him where she had heard he lived; and that she afterwards came again on the same business. In June, 1848, she also called at the office alone, in regard to the alterations made by Mr. Rathbone, on the rear of the premises in Liberty street. Mr. Dewey and Mrs. Phillips were the subscribing witnesses to the will. The latter says, though she observed some signs of forgetfulness in the deceased before the execution of the will, she thought her mind sound and her memory pretty good. The former, who had lived in the same house with Mrs. Maverick for a year, says her mind was sound; and though in regard to recent events in which she had no interest, her memory was defective, yet as to recent events in which she had an interest it "was remarkably good."

In respect to her testamentary intentions, I think the evidence very conclusive. Catherine Braman relates that, eleven years ago, she heard the decedent speak of leaving property to Howell Maverick and his children. Mrs. Osborn testifies that, twelve years before her decease, she told her granddaughter, Mrs. Harris, she would not forget her and her children; they should never want anything whilst she had a dollar; that Clara had not treated her well, and she would not leave her children anything. This is the only trace of any difficulty ever existing between the deceased and her daughter-in-law; and if there was any in fact, the evidence shows it must have been soon obliterated. The

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MAVERICK vs. REYNOLDS.

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proof is very full that she was tenderly attached to Clara and her children, the former of whom was united to her by the double tie of niece and daughter-in-law ; and with all of whom, for many years, she had resided in the same house. It is possible that at the period spoken of by Mrs. Osborn and Mrs. Braman, she may have designed distributing her property among all her grandchildren ; but it must be remembered that her son was then alive ; and that in 1842 she made a will giving him all her estate, and in case of his decease devising it to Clara. If she ever had a contrary intention, then, it could not have existed long before it was changed. Mrs. Townsend testified that the morning after the will of June, 1848, was made, she asked her what the paper was she had signed, and she said she did not remember, only she was told by Mr. Reynolds it was her last will and testament. At Mrs. Townsend's suggestion, she subsequently spoke to Mr. Reynolds repeatedly on the subject, until finally he stated what it was ; and then she was satisfied. It is very evident that Mrs. Townsend was unable to give the correct purport of Mr. Reynolds' statement, or that he gave an absurd answer ; and I see no reason to suppose the latter. Angelica Maverick also says that she asked the decedent what she had been signing, and she said Mr. Reynolds told her it was her will, but she knew nothing further about it. On being asked if he "had willed away her money to Clara's children ? she replied that if he had, it should not stand so ; she would go immediately down to his office and have it rectified." It does not appear that she ever did ; and yet it is plain enough she knew it was her will.

On the other hand, Mrs. Nellis states that when she stayed with Mrs. Maverick after Clara's funeral, she said, "I am getting old, and I cannot keep house any more, and I am too old to bring up these children." The witness said Mr. Reynolds would see to that, and she answered, "Yes ; and he shall have all I have to take care of them." Mrs.

## MAVERICK vs. REYNOLDS.

Nellis also testified that after the death of Mr. Howell, Mrs. Maverick said, "Mr. Howell has left each of his grandchildren a thousand dollars apiece, and when I die, Clara's children shall have all I have."

Mrs. Townsend says she often heard the decedent say she intended to give her property to her grandson Philip (one of the devisees), before and after she executed her will.

Mr. Burke states that in 1849, she told him "that inasmuch as the first children of her son Samuel, by his first wife, had had something from their grandfather Howell—somewhere about a thousand dollars apiece—she thought it no more than right that Clara's children should receive as much, so as to equalize." He asked her whether she had made a will; she replied she had; Mr. Reynolds had drawn it, and had it in his possession. He adds, "She did not say how she had made the will; she was a woman who I do not think would have told." Mrs. Burke corroborates this statement substantially, though she says the decedent said, "she had left her property to Clara's children."

Mrs. Everett testifies she often heard the decedent, when Philip and Clarkson asked her for money, say she intended to keep it for them till she was dead, and then they would have the benefit of it.

Mr. Dewey, a subscribing witness, states that at the time the will was executed, and Mr. Reynolds asked her if she wished any alterations, she replied in the negative, adding, "It gives the property to Mrs. Maverick's (Clara's) boys; and I want them to have it, because the girls have been provided for."

Finally, Thomas B. Townsend testifies that before the execution of the will, she spoke of her intention to leave her property to these children, and after the will was made, she said she had given or willed it all to them.

The circumstances attending the execution of the will are worthy of consideration. It was done at the house of the executor, Mr. Reynolds, in the presence of the subscrib-

## MAVERICK VS. REYNOLDS.

ing witnesses, and Mrs. Townsend, Mrs. Reynolds, and Miss Maverick. The witnesses were called into the back parlor by Mr. Reynolds; the will was read audibly and deliberately; questions were asked, and explanations made; and it was duly executed. There was not only no clandestinity, but unusual publicity.

Under all the circumstances, I can see no reason why this instrument should be denied probate. The evidence very clearly shows that the decedent was sound in mind and memory, and with faculties unimpaired, at the decease of her daughter-in-law in February, 1848. The will was executed within four months after—a period not sufficient in the ordinary course of nature for any material and decided decay of mental power, unless on the supervention of some extraordinary circumstance. A serious attack of sickness might have hastened such an issue; and if Dr. Pratt were not mistaken in dating his observation of her failing memory at the illness in April, 1848, that fact would be very material in reaching a just conclusion. That he may be in error in this respect, is manifest from his having altogether forgotten a longer, and as Mr. Townsend states more severe sickness, at about the same period of the year in 1850. He recollected only one sickness, and had an interview with Mrs. Townsend as to the time, and finding it had occurred in 1848, that circumstance together with his forgetfulness as to the sickness of 1850, must have had some influence in leading his mind to the conclusion he came to. In 1848, he first visited Mrs. Maverick, April 1st, and he thought she was out the last of April, or some time in May. It is in proof that she attended the funeral of her granddaughter, Maria Louisa Maverick, in Robinson street, on the 20th of April. I have no doubt at all, that Dr. Pratt is correct in his statement that he observed a failure in the capacity of the decedent as a consequent upon an attack of sickness; but as the general tenor of the testimony tends to show that her mental powers

## MAVERICK vs. REYNOLDS.

remained in a fair state of preservation until 1850, and the observation of many witnesses placed the decline of her memory in that year, I cannot but think that the attack in 1850 must have been the sickness after which he noticed her mind failing, and not that of 1848. This is the only way of reconciling his statements with other circumstances well established ; and upon any other hypothesis, the weight of evidence is against him.

It is true, the decedent was a very aged lady. But, with a physical constitution of unusual vigor, her mind up to the year 1848 had also maintained remarkably its strength and tone. One witness testified that she was childish twenty-five years ago, but among all the witnesses she stood alone in this opinion. She speaks of light and frivolous remarks made by the old lady ; but it is easy to misconstrue or misunderstand pleasantry and vivacity. This venerable lady was baptized by the Rev. Dr. Berrian in 1831, at the age of seventy-three, and appears to have continued a faithful attendant on the ministrations of the church. Nothing has fallen from any of the witnesses, except this one, indicating unbecoming deportment. It is worthy of remark that persons attaining great age often possess a large degree of that cheerful and lively manner which characterises youth, and which probably in them contributes greatly to a green old age, when others not so old and possessing less of this sprightliness and vivacity appear more decrepid and stricken in years. It is not difficult to misconceive these qualities, and to characterize them as childish ; and as there is great danger of being censorious and captious in such a judgment, the mere opinion of a single witness on such a point cannot be very material, especially when no one is found to agree with her.

There is satisfactory evidence, then, of the testamentary capacity of Mrs. Maverick in June, 1848. Six years before, she had made a will giving her estate to the mother of these children, in case of their father's decease. The

## MAVERICK vs. REYNOLDS.

small legacies to the other children, judging from her statement, had probably been paid. The will of 1848 is in harmony with this previous devise, and in furtherance of the same purpose. It accords with her intentions as expressed to a number of persons before and after it was executed. In view of her other grandchildren, who were adults, having received some provision from their grandfather, it was not unreasonable she should desire to place these minors on an equality. She gives them one seventh of the house where she had resided, and where they had been brought up. Their mother was dead, and they were left to her care: she expressed and doubtless felt for them great affection and solicitude. The will containing her wishes was executed in the most open manner,—it was read aloud and explained, and there is no sign of concealment, influence, or deception. If, as stated by two of the witnesses, the old lady forgot the contents, almost immediately, I am satisfied she had the mind to understand the purport of the instrument at the time, and did understand it, and the will accorded with her wishes. It was her will. Besides, it appears very clearly that long after, she knew what she had done very well, and spake of it to those who were friendly to the children; while it is very likely that to escape importunity from others, she may have put them off as best she could. She died leaving this instrument undisturbed.

Great age alone does not constitute testamentary disqualification; but, on the contrary it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials, are shown to have existed, and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness. The weight of proof is in favor of the will on these points, and sentence of probate must therefore be decreed.

## MEEHAN vs. ROURKE.

*In the matter of proving the last Will and Testament of  
ELIZABETH MACDONALD, deceased.*

WHEN a subscribing witness made her mark, opposite her name written by the other witness, and she "acknowledged it to be her mark and signature," *Held*, that the mode of attestation was a sufficient compliance with the statute requiring the witness to "sign his name."

A witness who has written the testator's name, at his request, must write his own name; but other witnesses may sign their names, either by writing or by placing a mark opposite to the name when written by another.

A will contested on the ground of testamentary incapacity, admitted to proof.

T. J. GLOVER, for Executors.

H. C. BANKS, for Next of Kin.

I. The will is improperly attested. Witnesses must "sign their names." *Stat. 29, Ch. II.*, requires testator to sign, and witnesses to "attest and subscribe." In *Harrison vs. Harrison*, 8 *Vesey*, 185, and referred to in 8 *Adolphus & Ellis*, 94, the Chancellor decided a mark a good attestation, because the "*the word sign did not apply to witness.*" The case in 5 *Johnson*, p. 144, was attested by initials. Jarman regards it, even under the English statute, at least improper, in the advanced state of education. (1 *Jarman*, 73.)

II. The language of the *Statute 29, Ch. II.*, has been adopted in many States *verbatim*, as it has been on some points in this State; but on the attestation of wills, it directly departs. If the intention of the framers of the

## MEEHAN vs. BOURKE.

law must govern, when the law is not explicit, what are we to infer from the variance?

III. A mark cannot be proven. (4 *Randolph*, 325. 4 *Yates*, 346. 1 *Haywood*, 19. *Cowen's Notes on Ph. Ev.*, 1306.) Therefore, if both were marksmen, and no witnesses to prove the fact of a mark being made, the death or absence of the witnesses would leave the will without attestation.

IV. The mark, or the fact of its having been made, cannot be proven by the associate witness; because it would subvert the intent of the statute, which provides two witnesses, to *guard from fraud*, and the whole execution would depend on the proof of one witness.

V. If the witness can prove the attestation of his associate by mark, other circumstances should afford *incontestable proof*, and the witness should be *beyond suspicion*; *vide* conflict of testimony, and antedate and interlineation of will in handwriting of Duggan.

VI. It is not proven according to statute, that the decedent requested the witnesses to sign or attest. The publication of a will must be *unequivocal*. (*Rutherford vs. Rutherford*, 1st *Denio*, 33.)

VII. The absence of Eliza Green is not proven, nor are proper efforts to procure her shown. All the cases cited in *Cowen's Notes, Ph. Ev.*, 1294, require more diligence than is here shown; and he says, "If the absence appears to be the result of collusion, secondary proof will not be admitted." The evident fraud in this case proves collusion.

VIII. The statute requiring that he who writes the testator's name, shall sign his own as a witness argues that

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MEEHAN vs. ROURKE.

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it is contemplated the witnesses' names shall be written, and is simply declaratory as to the fact as to who shall be a witness.

IX. The evident torpidity of the mental faculties requires a lucid relapse to be clearly shown by undoubted evidence (*Vid. Opinion, Case of Catherine Kerr—Bradford, Surrogate.*) "The evidence to establish the fact should be of the clearest character."

X. Typhus fever in the stages preceding death, incapacitates the mind. (1 *Beck's Med. Jur.*, 10th ed., p. 821.)

THE SURROGATE. The decedent was a widow woman, between fifty and sixty years of age, and died on Thursday, February 5th, 1852, at the house of Mrs. Swift, where she had been boarding for nearly two years. Her disease was typhus fever, with which she was attacked eight or ten days before her decease. The will disposed of her property as follows:—To her sister Susan, \$700; to Mrs. Swift, the wife of a cousin, \$200, in addition to \$200 acknowledged to be due to her; to Catherine Hagan, a second cousin, \$150; Mary Hagan, \$50; Arthur Hagan, \$100; Bridget Hagan, \$30; Patrick Minor, a friend, \$50, and to Anne, his daughter, \$100; Rose Corcoran, a relative, \$100; Anne Rourke, a niece, \$100; and the Rev. Thomas Farrell, \$100.

The will was drawn by Dr. Duggan, the decedent's medical attendant. He states that she requested him at a previous visit, the evening before or that morning, to draw a will for her; he could not then stay, but promised to call again. "Accordingly," he says, "at my next visit I drew it, and it was executed. I can't say whether it was Monday or Tuesday, or what day of the week it was." Dr. Duggan also testifies that the will was executed the

## MEEHAN VS. ROURKE.

day it bears date, February 2nd, 1852. He says the decedent dictated the entire instrument; showed where her papers were; gave Mrs. Swift the keys of the drawer to get them out; told him every place where the different sums of money mentioned in the will were deposited; and spoke so as to make him understand every word she said, though, from her tongue being parched and dry, her utterance was not so distinct as usual. After it was written, the will was read aloud to the decedent, in the presence of Eliza Green, and was then executed. He also declares in the broadest terms, that her mind was sound during the whole course of her sickness, from the first to the last visit, and that she was never in a stupor till the day she died.

The Rev. Thomas Farrell, a legatee under the will to the extent of \$100,—but who, on releasing his legacy, was admitted as a competent witness,—states that he attended the decedent, six or seven times, during her sickness; that he was present at her residence when her will was being prepared, and, understanding a legacy of \$100 was to be given to him, went into the decedent's room and remonstrated with her. She told him not to trouble himself about it, and that she had made up her mind for some time to leave him something. She said that quite distinctly. The doctor then came in to draw the will, and Mr. Farrell heard her tell him what she had to leave, and where it was deposited. He says, "I think it was some kind of railroad stock. I also recollect she spoke something of money she had then in her drawer, and requested somebody to look for it and get it. Search was made, and they could not find it for some time. However, by her directions, and pointing out more minutely where it was, they got it. I also heard her say she had as much money as would pay her funeral expenses, independent of what she mentioned in her will. I heard her mention the various persons to whom she was leaving something in her will.

## MEEHAN vs. ROURKE.

She gave all these directions herself, with her own lips. I remember, she mentioned Mrs. Swift as a legatee for a certain amount. I think Mrs. Swift, if not remonstrating, at least told her to consider the matter well. Dr. Duggan was writing the will, in her bedroom, while she was giving these instructions. I left before the will was executed, at least I think I did."

Catherine Leonard, who lived in the same house with Mrs. Macdonald, states that she saw her the Monday before she died, and she talked sensibly. This was between 8 and 9 A. M., and she left because the doctor and clergyman came. The next day the witness thought she could not speak so plainly. On the preceding Sunday, she testifies that she found her sitting in a rocking-chair, dressed.

Daniel Riley testifies, that on the Sunday preceding her decease, he called to see Mrs. Macdonald, and found her sitting in a rocking-chair, in her sitting-room, whilst her bed was being made for her. He had some conversation with her; and while he was there, her attendants took her under the arms and put her to bed. He communicated the fact of her sickness to Thomas Rourke about half past seven o'clock Monday morning, when he came to the shop where they worked together. Thomas Rourke, he says, got ready, and went up immediately.

Thomas Rourke states that he went to the house between nine and ten, and staid about an hour. He says she could not speak very plainly. She asked him how his wife and his sister's children were. "She said, Margaret and the children, how are they? . . . She said this in a broken manner, could hardly say two syllables together; she could not." Rourke thought he went there again that evening, and recollected that he called the next morning. He testified that on Tuesday morning she tried to speak, but was unable. He could not understand anything she said, or tried to say.

On the side of the contestants, Anne Rourke, the niece

## CASES IN THE SURROGATE'S COURT.

MEEHAN vs. ROURKE.

of the decedent, states that she first saw her during her last sickness, on Monday; that she was then speechless, and hardly recognized her. This was about eleven or twelve o'clock, and she stayed there about two hours. She called again the next day, between twelve and one, and remained till her aunt's death.

Mr. Harrison visited her on business, he says, on Monday between twelve and two. He asked her several questions, and found her unable to speak. He came again the next day, not far from noon, spoke to her and got no reply, though she made an effort to speak.

Peter Blake testified that on the 29th of August last, he met Dr. Duggan in the street, and said, "Doctor, you never told me my cousin, Mrs. Macdonald, was sick." He adds, "I asked him if he understood about Mrs. Macdonald's will; and he said it was no good at all, that she was out of her mind before he saw her."

The will bears date, February 2, 1852; but as the date is written at the head and at the foot of the will, in such a way as to show manifestly that it was added after the rest of the instrument was written, that circumstance might seem suspicious. But Dr. Duggan says positively, it was written at the time of the execution. If the will was executed on Monday, the day it bears date, the evidence shows the decedent had testamentary capacity. She was able to sit up on Sunday night, and Thomas Rourke swears she spoke to him, Monday morning.

The will was made about noon; and yet, if made on Tuesday, how is this possible when Harrison swears he was there at that time, and the doctor came in while he was there; and Anne Rourke testifies that as she came on Tuesday the doctor was going out? So, likewise, if Anne was there on Monday between eleven and twelve, how was it she saw neither the doctor, nor the priest, nor the will? Now, Anne makes two visits: she states certain circumstances which occurred at the second, among which is a visit made

## MEEHAN vs. ROURKE.

by Mrs. Van Zandt, a lady with whom Mrs. Macdonald formerly lived. This, she says, took place Tuesday afternoon. Mrs. Van Zandt proves it was Wednesday afternoon. I think, therefore, that Anne made her first visit on Tuesday, and her second on Wednesday. Again, Mr. Harrison thinks his first visit was on Monday, for the reason that he paid off all hands on Monday, and his wife sent Anne to look for a girl that day; and yet, on reflection, he states that he only paid Thomas Rourke on Monday, because he had not been there on Saturday. Thomas Rourke testifies that on Tuesday Mrs. Swift sent him for the priest, to come and make the will, as the doctor was to be there at 12 o'clock. The Rev. Mr. Farrell, however, declares that he knew nothing about a will till he arrived at the house.

Anne Rourke is the daughter of the contestant: Thomas Rourke and Mrs. Harrison are half-brother and half-sister of the contestant. They may be mistaken as to *time*, but there can be no mistake in respect to the testimony of the physician and the clergyman: the facts they swear to are minutely stated, and, if true, show that the paper pronounced is the last will of the deceased, made and dictated by her. If they are untrue, it is not a mistake about a date or a day, but it is wilful perjury. The case is still more complicated in consequence of the absence of Eliza Green, one of the subscribing witnesses to the will, and a niece of Mrs. Swift, a legatee—and of the statement of Peter Blake, who says the doctor told him the decedent had lost her mind before he saw her. This the doctor denies; and as it is evident the fact was otherwise, it is very extraordinary that he should tell Blake an untruth, in order to destroy a will he himself drew and witnessed.

I confess much embarrassment in finding a clue to guide me to a solution of these conflicting statements. I must suppose mistakes as to dates and conversations, on the one hand, or, on the other, find two respectable men, having no apparent interest in the transaction, guilty of corrupt

## MEEHAN vs. ROURKE.

swearing. I cannot say there is sufficient evidence to force the latter conclusion upon my mind, and have therefore determined to admit the will to probate, if the formalities of execution were properly performed. In arriving at this result I have not overlooked the medical testimony, to the effect, that typhus-fever is generally accompanied with stupor and mental disturbance. But the decedent appears to have been very lightly attacked at first.—She could sit up and converse on Sunday, she recognised and spoke with Thomas Rourke on Monday, and, as testified to by the doctor and clergyman, gave particular instructions when the will was made. This evidence establishes the fact of competency, and shows either an exception to the medical rule, or a mistake as to the type of the disease at that stage.

Eliza Green, one of the witnesses, attested the will by making a mark. The doctor wrote her name; she made her mark, he guiding the pen; and then she acknowledged it to be "her mark and signature." Before the Revised Statutes, a witness might attest a will by mark. The statute of 1 Vic., c. 26, requires the witnesses to "attest" and "subscribe" the will; and this, it has been decided, may be done by signature or mark, but the witness must, in either case, partake in the physical act of subscribing. Our statute requires the witness to "*sign* his name;" and where a witness has subscribed the testator's name by his direction, he is required to "*write* his own name as a witness to the will." The variance in the phraseology is not unimportant. A witness who has written the testator's name, must *write* his own. He has shown he can write. Other witnesses may "*sign* their names." Where another person writes the name of the witness and then the witness acknowledges the signature—puts his mark to it, his *signature*—he literally *signs*; and what he signs is his name—i. e. he signs his name—while a mark alone would not be sufficient. I think the requisition of the statute sufficiently

## MEEHAN vs. BOURKE.

complied with, by the name of the witness being written at the end of the will, and the witness putting his mark thereto. This construction meets the design of the Legislature, in having the name of the witness, and excluding wills attested only by marks; and does not shut out the attestation of wills by illiterate persons, when a penman can be found to record the transaction. I should come to any other conclusion with regret, as otherwise I should be compelled very frequently to reject wills attested by marksmen, the experience of this office showing that mode of execution to be very common. But, aside from the consequences, I do not think the rule contended for justified by the language of the statute, or consistent with the distinction made between a witness *writing* his name, when he has subscribed the testator's name, and being required in all other cases, only to "*sign* his name." There must, then, be a decree declaring the will in this case duly proved.

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SEARS vs. MACK'S ASSIGNEES.

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## SEARS vs. MACK'S ASSIGNEES.

*In the matter of the estate of WILLIAM RENWICK, deceased.*

THE surplus of the proceeds of the sale of the real estate of a deceased person, remaining after the payment of his debts, is distributable among his heirs, or the persons claiming under them.

The sale and conveyance by the administrator, under the order of the Surrogate, pass all the estate, right, and interest of the deceased in the lands at the time of his death, and oust the title of the heirs and all persons claiming under them. But the title of the heirs to the surplus of the proceeds, is recognized by the statute.

If, at the time of the sale, there are liens by mortgage, judgment, or decree, against the portions of any of the heirs, it is equitable that on a claim filed, such liens should be admitted as a valid charge against the shares of the heirs in the surplus.

The equity of general-lien creditors, is regulated by the priority existing at the time of the sale.

An amendment of a docket of a judgment made after the title of the judgment debtor has been divested in due course of law, does not operate to give a lien on the estate so sold under a prior incumbrance.

Where a judgment was correctly docketed in every respect except that the time when it was perfected was entered as of 1842, instead of 1841, *Held*, that the error was not substantial as against a junior judgment creditor claiming priority of lien in consequence of such mistake, upon surplus monies.

## S. M. WOODBURN, for Mack's Assignees.

I. The sale had on the 8th day of January, 1851, by order of the Surrogate, divests the lien of any judgment creditor of Robt. J. Renwick.

II. The sale was had under the Surrogate's order, within the existence of the lien of the Mack judgments.

III. If a sale had been made under these judgments, of the lots sold by the Surrogate's order prior to such last

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SEARS vs. MACK'S ASSIGNEES.

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sale, no valid title could have been made, and the purchaser would have been without remedy.

IV. Judgments are liens upon surplus proceeds of sale, according to their priorities at the time of commencement of proceedings, when such proceedings necessarily terminate in a sale.

V. In cases of foreclosure, the rule of reference is to ascertain liens on the premises sold at the time of sale. (*Vide Sup. Court Rule 51.*)

VI. The proceeds to be distributed are in the nature of personal assets, and as such, liable to the rule of priority governing executors. (*Vide Ainslie vs. Radcliff, 7 Paige, 439.*)

On the question of the jurisdiction of the judge of the County Court, to make amendment, the following points are offered:—

I. By the act of 1844, §7, p. 92, the Legislature gave the power to the Courts of Com. Pleas, to amend all their records *nunc pro tunc*.

II. The VIth art., §14, of the constitution, provides that the County Court shall have such jurisdiction in special cases as the Legislature may prescribe.

III. By sects. 29 and 36, of the judiciary act, provision is made for the County Court to have the same jurisdiction as Com. Pleas Courts—not inconsistent with the constitution. (*Vide Laws of 1847, p. 330. Vide p. 355, § 55, p. 336, § 58.*)

IV. The proceedings provided to be had by the above

## SEARS vs. MACK'S ASSIGNEES.

sections of the judiciary act, are legislative constructions of the constitution on the points in question. (*Vide 5th Bar. Sup. Court Rep.*, p. 169.)

V. In the case of *Buchan vs. Sumner*, 2 *Barbour Ch. Rep.* 165, there was no docketting of the judgment which could by any possibility give notice to others, it being docketed against *Mr. Sumner*, and not *Mr. Palmer*, the debtor.

In the case of *Renwick*, the docket gave as full notice as if it were in all respects correct.

The only mistake was putting 1842 in place of 1841, as the year of recovery: the county, the amount, the month and day of the month, were all correct; and Mr. Sears had as much notice of the judgment when he recovered his, and five years before, as if the error had not been made. It was of no importance to him.

1. In *Buchan vs. Sumner*, the Superior Court, which made the order to amend, expressly reserved the rights of the subsequent judgment creditors, from which order there was no appeal.

Here the order of the County Court is otherwise; it directs the amendment *nunc pro tunc*, without such reservation; so that the docket is now, as if there had been no error in it. On this point Mr. Sears was heard before that Court, and it is *res judicata*.

2. In *Buchan vs. Sumner*, the rights of the subsequent judgment creditor, whatever they were, were fixed *before the act of 1844*.

That was the principal ground on which the Mount Vernon Bank relied (p. 174) and on which the Superior Court reserved their priority (p. 176.)

Here, Mr. Sears' judgment was long *after* the act of 1844.

3. The Chancellor's opinion does not indicate that, in a

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SEARS vs. MACK'S ASSIGNEES.

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case like the present, he would have given priority to the subsequent judgment.

That the land had been sold and converted into money, could make no difference.

The case of *Hunt vs. Grant*, 19 *Wend.*, 91, exhibits the correct rule: to wit., that the amendment, in a case like the present, is to be made as against subsequent judgment creditors, unless it is shown they have been misled by the error, and acted upon it. In that case the *amount* was changed from \$3,000 to \$30,000; much more important than the date.

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G. C. GODDARD, for Mack's Assignees.

I. Stephen Mack, a judgment creditor of Robert J. Renwick, one of the heirs of William Renwick, is entitled to receive the proceeds of the sale which fall to Robert's share.

1. The lands sold descended to the heirs, and the judgments against Robert became liens on his undivided share in their order of priority, those of Mack being the first.

2. Mack's judgments were liens on Robert's share down to the time of the sale in this case; subject, however, to the right of the creditors of William to have the property sold for the payment of his debts.

3. The sale by order of the Surrogate, though subject by statute to judgments against William, if there were any, was of course free from judgments against the heirs. *All* William's right was sold, and his right was not affected by judgments against his heirs.

4. The liens on Robert's share being divested by the sale, and the property vested in the purchasers, and there being a surplus from the sale; it must be distributed according to the rights of parties at the time of the sale.

## SEARS vs. MACK'S ASSIGNEES.

This is the rule in all other cases of the sale of real estate under foreclosure, in partition, &c.: the proceeds are paid to judgment creditors as they stood at the time of the sale, whether ten years have elapsed at the time of distribution or not.

After the property is thus sold, a judgment creditor could not, by *scire facias* or action of debt, revive his lien on it.

If the judgments were still liens on the land, they would be enforced against it, if not paid from the sale.

The amount due on Mack's judgments much exceeds the amount coming to Robert. He has no other security; if he had, then, after being paid in full, other judgment creditors might, by subrogation, have the benefit of such other security.

II. The *County Court* had power to make the order amending the docket.

*Act of 1844, chap. 104, sec. 7, p. 92*, gives the power to the *Courts of Common Pleas*.

This power has since been given to the *County Courts*.

*Constitution, art. 6, sec. 5*. The *Legislature* retains the power to regulate the jurisdiction and proceedings in law, &c.

*Constitution, art. 6, sec. 14*. The *County Court* has such jurisdiction in *special cases, as the Legislature may prescribe*.

*Judiciary Act, 1847, sec. 29, p. 328*. *County Courts* have power, to hear and determine all matters, *especially conferred by Statute on the Courts of Common Pleas*.

*Judiciary Act, 1847, sec. 36*. All laws relating to the *Common Pleas*, their powers, duties, and proceedings, are applicable to the *County Courts*, so far as consistent with the constitution.

*Code, 1851, sec. 30, subdivision 11*. *County Courts*

## SEARS VS. MACK'S ASSIGNEES.

are to exercise all *powers* and jurisdiction conferred, *by statute*, on the Courts of *Common Pleas*.

III. The 14th art. of the constitution, sec. 5, transferring suits *pending* in the Common Pleas to the Supreme Court, does not affect this question.

1. A judgment is not a suit *pending*.

2. Amending the mistake of a clerk in docketing a judgment is not a proceeding affecting the judgment, like a motion for new trial, alteration of the record, &c., no more than *issuing*, and of course *regulating*, *executions* on judgments, which the 55th sec. of the judiciary act provides for.

The case 3 *How. Prac. Rep.*, 175, sustains this, and only enlarges the ordinary import of the word *pending*, so far as to embrace any proceeding which calls in question the judgment itself.

IV. The Surrogate will not deem it necessary to inquire *how* the docket, of which a transcript is now produced, was entered on the records of this county, any further than to give each party every opportunity to seek his remedy elsewhere, to correct it if it is wrong—if the alleged error will work injustice.

Had the clerk of the county amended the record *without any order*, the Surrogate would probably not look beyond the docket as amended, except to give the complaining party such opportunity. So if it was alleged that the court who rendered the *judgment had no jurisdiction*, the Surrogate would not collaterally investigate the question. If the Surrogate looks beyond the docket *as it is*, to what it *should be*, that is, to make it conform to the *truth* and the *fact*, he then finds that Mack's judgments were obtained, and were docketed in this county, before that of Mr. Sears.

V. Amending the docket of a judgment, by correcting the error of a clerk, *nunc pro tunc*, is a matter of course,

## SEARS VS. MACK'S ASSIGNEES.

and a subsequent judgment creditor cannot object. (2 *Rev. S.*, p. 424, §§ 7 and 8.) The power also existed at common law. This is not repealed. (3 *Prac. Rep.*, 305; *Hunt vs. Grant & Towbridge*, 19 *Wendell*, 90; *Seaman vs. Brake*, 1 *Caines*; *Close vs. Gillespey*, 3 *Johns'*, 518.)

*Act of 1844*, p. 92, gives this power in terms.

WM. S. SEARS, in person.

I. If, for the purpose of this argument we consider the judgments held by Gordon Burnham as regularly docketed in the office of the Clerk of the County of New York, the lien of the judgments was lost before the sale of the property on 16th and 17th streets was made and confirmed, for the following reasons:—

1st. The judgments were docketed on the 15th March, 1841.

2d. They continued a lien for ten years, only as against purchasers in good faith, mortgagees, and judgment creditors or otherwise. (2 *R. S.*, 4th ed., p. 606, § 5.)

3d. The order confirming the sale of these parcels of land was not made until the 9th of May, 1852.

4th. The sale is not made, nor the heirs divested of the property, until the order confirming the sale is made. (2 *R. S.*, 4th ed., p. 290. § 34; *Rea vs. McEachron*, 18 *Wendell*, p. 465; *Atkins et. al. vs. Bostwick*, 20 *Wendell*, p. 241.)

5th. The judgments held by Burnham must be considered as junior judgments to the judgment held by Sears. (*Ex parte The Peru Iron Company*, 7 *Cowen*, p. 540; *Tufts' Administrator vs. Tufts*, 18 *Wendell*, p. 621.)

6th. The distributive share of Robert J. Renwick, of the proceeds of the sale of these parcels, must be applied to the payment of the judgment held by Sears, it being the prior lien.

## SEARS VS. MACK'S ASSIGNEES.

II. On the part of the judgment creditor Sears, it is insisted that neither of the judgments recovered by Stephen Mack against Robert I. Renwick, in the Court of Common Pleas for Tompkins County, and now claimed by Gordon Burnham, ever formed a lien upon the real estate of Robert I. Renwick, sold under the decree of the Surrogate,—for the reasons hereafter stated :

1. The judgments purport to have been docketed in Tompkins County Common Pleas, on the 15th day of March, in the year 1841, and docketed in the office of the clerk of the city and county of New York, on the 3d day of May in the year 1842, as recovered on the 15th day of March, in the year 1842.

By the Act of May 14th, 1840 (*See Statutes of 1840, p. 334, § 25*), no judgment or decree which shall be entered after this act takes effect, shall be a lien upon real estate, unless the same shall be docketed in books to be provided and kept for that purpose by the county clerk of the county where the lands are situate.

§ 26. After this act takes effect, when judgments shall be perfected in the Supreme Court, or at any time within five years thereafter, the clerk, on request and on payment of the fees for the same, shall furnish the party with one or more certificates or transcripts containing all the facts necessary to make a perfect docket of the judgment; and on presenting such transcript to any county clerk, he shall immediately file the same, and docket the judgment in the manner required by law, specifying the court in which the judgment was recovered, the day or the hour on which it was perfected, and the day and hour of docketing the same.

§ 29. The judgments of the Superior Court of the city of New York, and of any court of common pleas, recovered after this act takes effect, may be docketed in the manner above mentioned in any other county than

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SEARS VS. MACK'S ASSIGNEES.

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that in which the judgment was rendered, with the like effect as is above provided in relation to judgments in the Supreme Court.

2. Over the judgments so docketed, the law did not give either of the courts any power to correct, alter, or amend the docket; and this remained so until the year 1844, April 1st (*See Laws of 1844, p. 92, § 7*), when the Legislature gave the Superior Court, and other courts, power to direct the amending and correcting such dockets, and the docketing judgments *nunc pro tunc* with said county clerks.

It clearly appears from the passage of this act, that all the jurisdiction either of the courts had over their judgments and the dockets, was conferred by the above act, and that the courts did not previous to the passage of that act pretend to exercise any equitable or common-law jurisdiction over these judgments or the dockets.

3. The Courts of Common Pleas referred to in that act, have been all abolished by the constitution, except the Court of Common Pleas for the city and county of New York.

The constitution which took effect on the 1st day of January 1847 (*Article 6, § 14*) declares, "The County Court shall have such jurisdiction in cases arising in Justices' Courts, and in special cases, as the Legislature may prescribe; but shall have no original jurisdiction except in such special cases."

The Legislature may confer equity jurisdiction in special cases upon the County Courts.

*Article 14, § 5*, declares that jurisdiction of "all suits and proceedings originally commenced and then pending in any Court of Common Pleas (except in the city and county of New York) shall," on the first Monday of July, 1847, "become vested in the Supreme Court, hereby established. Proceedings pending in courts of Common Pleas and in suits originally commenced in Justices' Courts,

## SEARS VS. MACK'S ASSIGNEES.

shall be transferred to the County Courts provided for in this constitution."

This section of the constitution vested in the Supreme Court every judgment then recovered in the Common Pleas courts, except those included in the exception, viz., those judgments which originated in the Justices' Courts. The term "pending" used in this section, does not restrict this section to causes in a state of litigation, but means all judgments as well as proceedings upon which any further adjudication was to be had. This is the only view of the section which can be taken, to render it consistent with the constitution and the judiciary act. This construction has been put upon the section by Judge Welles in his able opinion in *O'Maley vs. Rees*, 3 *Howard's Practice Reports*, p. 175.

4. The jurisdiction of the Courts of Common Pleas, in all actions, was by the constitution vested in the Supreme Court, except such as originated in the Justices' Courts, which are reserved by the above section.

The judiciary act of 1847 (*Laws of 1847*, p. 328, § 29-36,) confers jurisdiction upon the County Courts in certain cases.

§ 30. The County Court in each county shall have power to hear, try, and determine according to law, suits and proceedings by *scire facias* to revive any judgment in said Court, or that shall have been rendered in the present Court of Common Pleas of said county, or to have execution of judgment.

The only construction which can be given to this section to make it consistent with the constitution, is that the County Court can exercise the powers enumerated in the section, upon the judgments remaining in the county Courts under the constitution. This is the section which Chief Justice Bronson considers unconstitutional. (*See 4 Const. R.*, p. 581., *Griswold vs. Sheldon*.)

5. The 58th section of the judiciary act gives the Su-

## SEARS VS. MACK'S ASSIGNEES.

preme Court power to revive any judgment of the then Supreme Court, and to have execution, and to revive any judgment in the Court of Common Pleas which shall on that day become vested in the Supreme Court organized by this act.

By the 59th section of the same act, any judgment or decision in any suit or proceeding *pending* in any Court of Common Pleas on the first Monday of July, 1847, which shall on that day become vested in the Supreme Court organized by this act, may be revived, and other proceedings had thereon by writ of error, *certiorari*, or *mandamus*.

This is shown by the division of the clauses of the sentence. The relative "which" must be referred to the principal subject of the sentence, which is the judgment or decision.

It provides for bringing a writ of error in the Supreme Court, on such judgment. If, as the judge of the County Court supposes, suits before judgment only, became vested in the Supreme Court, and not judgments already rendered in the Courts of Common Pleas, and this section means only that the *suits* or *proceedings* became vested in the Supreme Court, and not the judgments, we should have the anomaly of the Legislature providing for a review of judgments rendered in the Supreme Court (for, the suit being vested in the Supreme Court before judgment, the judgment when rendered, must necessarily be the judgment of that Court) by the same Supreme Court; and there is nothing to render it probable that the Legislature intended to introduce any such anomaly as that of a Court reviewing its own judgments by writ of error. Whereas, if it is the *judgment* or *decision* of the Common Pleas, that becomes vested in the Supreme Court; inasmuch as it is only the judgment of the Court of Common Pleas, there is no incongruity in its being reviewed by the Supreme Court on writ of error.

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SEARS vs. MACK'S ASSIGNEES.

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The last sentence of Section 59 also shows that it is the judgment of the Common Pleas that became vested in the Supreme Court; because it provides for a class of decisions rendered in the Common Pleas, which did *not* become vested in the Supreme Court, but in the County Courts. This evidently refers to decisions in suits originally commenced in Justices' Courts, which by Section 5 of the constitution, did not become vested in the Supreme Court, but were transferred to the County Courts.

6. If the county judge is right in his opinion, and the judgment in this case still remains in the County Court, still no power exists in that Court to grant the motion to *amend*. This point, which is left untouched by the opinion of the county judge, is fatal to the application to amend.

It appears from the preceding acts that by the judiciary act the County Court had no jurisdiction left to it over this judgment.

7. We will now examine the jurisdiction conferred by the Code of 1848 upon the County Courts.

*Laws of 1848, p. 503, § 32.* "All statutes now in force conferring or defining the jurisdiction of the County Courts are hereby repealed, and those Courts shall have no other jurisdiction than that provided in next section. But the repeal contained in this section shall not affect any proceeding now pending in those Courts."

The 33rd Section does not confer any jurisdiction on the County Court over this judgment.

The Code of 1849. (*See Laws of 1849, p. 613-619, § 29.*) "All statutes now in force conferring or defining the jurisdiction of the County Courts, *so far as they conflict with this act* are repealed, and those Courts shall have no other jurisdiction than that provided in the next section. But the repeal contained in this act shall not affect any proceedings now pending in those Courts.

## SEARS vs. MACK'S ASSIGNEES.

The *Code of 1851*, p. 11, sec. 29, is the same.

Section 468 (*page 704 of Laws of 1849*) repeals all statutory provisions inconsistent with this act, but the repeal shall not revive statutes or laws which have been repealed.

The *Amendments to the Code, by Act of the Legislature of 1851*, have the same clause. (See *Laws of 1851 [Code]*, page 145, sec. 468.)

The *Statute of 1844* (see *Laws of 1844*, ch. 104, sec. 7), was repealed by the constitution, by the judiciary act, and by the Code of 1848, 1849, and 1851.

8. The judgments in question never formed any lien upon the real estate of the defendant in the county of New York, for the reason that they were not docketed as required by the act of 1840; and unless docketed as required by the act, the docketing in that clerk's office had no more force or validity than if they had never been docketed.

In the case of *Ex parte Becker*, 4 *Hill's R.*, p. 613, Chief Justice Bronson decided that a judgment recovered after the Act of 1840 took effect, although in the Supreme Court, in a suit commenced before the act was passed, was not a lien upon real estate, unless docketed in the county where lands are situate.

9. We will now suppose that the County Court could have amended this docket: must not the amendment be subject to the rights of other incumbrancers and judgment creditors?

In the case in 10 *Wendell*, p. 542 (*Ex parte Butler et al. vs. Lewis Common Pleas*) in which all the previous cases are examined—Justice Nelson decided that judgment creditors are on the same footing, by the Revised Statutes, that purchasers and mortgagees were by the Revised Laws of 1813.

The case in 3 *Cowen*, p. 39, *Chichester et al. vs. Cande*, was upon the principle, 1st: That the junior judg-

## SEARS vs. MACK'S ASSIGNEES.

ment creditors had notice of the previous judgment, and 2nd: That the preference contended for was upon personal property. At page 53 of that case, the judge says: "Here is not a struggle in relation to freehold estate, the disposition of which might be controlled by the priority of the judgments, which are themselves liens upon that kind of property." (See 10 *Wend.*, p. 542.)

In those cases there was notice. This case differs: there is not any notice.

The priority sought to be established is upon real estate.

In the case of *Taylor vs. Ranney et al.*, 4 *Hill*, p. 619, where the real estate had been sold by junior judgment, and the *ft. fa.* had been returned satisfied on the previous judgment, on application to correct the return of the *ft. fa.*, the Court reserved the rights of the junior judgment creditors.

10. Uis Honor, Judge Boardman, erred in allowing the amendment, for the reason that the County Court had no jurisdiction of the matter.

The jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied upon, and brought before the latter by a party claiming the benefit of such judgment or proceedings. (See 4 *Howard's Practice Rep.*, p. 429; *Doty vs. Brown.*)

It was held also, in the same case, that if the former court acted without authority, its judgment and proceedings were void, and formed no bar to a remedy brought in opposition to them.

**THE SURREGATE.** The real estate of the intestate having been sold for the payment of his debts, the surplus of the proceeds remaining after satisfying all claims, was distributed among the heirs of the intestate, except the share of Robert J. Renwick, which was reserved for further direc-

## SEARS VS. MACK'S ASSIGNEES.

tions. The statute directs the payment of the surplus to the heirs, "or the persons claiming under them" (2 *R. S.*, p. 107, § 43). The sale and conveyance by the administrator, under the order of the Surrogate, passed all the estate, right, and interest of the deceased in the lands, at the time of his death (2 *R. S.*, p. 105, § 31), and of course ousted the title of the heirs and all persons claiming under them. But the title of the heirs to the surplus, remaining after the payment of the debts, is recognised by the statute; and if, at the time of the sale, there were liens by mortgage, judgment, or decree against the portions of any of the heirs, and which liens have been cut off by the sale,—it would seem equitable that, on a claim being filed, such liens should be admitted as a valid charge against the shares of the heirs in the surplus. Stephen Mack's assignee, and William S. Sears, judgment creditors of Robert J. Renwick, one of the heirs of the intestate, intervened for the protection of their respective interests, at an early stage of the proceedings instituted for the sale of the real estate; and, on the distribution of the surplus, they claimed payment of their judgments out of the share of Robert. Mack recovered two judgments against Robert J. Renwick, in the Court of Common Pleas of Tompkins county, on the 15th of March, 1841. Transcripts were filed in the office of the clerk of the county of New York, on the 3rd of May, 1842; but the judgments were incorrectly docketed as perfected on 15th of March, 1842, instead of the 15th of March, 1841.

Mr. Sears, whose judgment was recovered in the Supreme Court, on the 11th of December, 1847, and was regularly docketed in this county, claims that the judgments of Mack were not prior liens on Robert's interest in the lands in question, by reason of the defect or error in the dockets. He also urges that, even if correctly docketed, the liens had expired before the sale ordered by the Surrogate had been confirmed.

## SEARS VS. MACK'S ASSIGNEES.

The sale was made the 8th day of January, 1851; the report of sale was filed January 25th, and, on the same day, an order of confirmation was entered. On the 1st of February the order of confirmation was modified so as to except therefrom four lots; and, on the 9th of May, the order making this exception was vacated as to three of the lots. I do not deem it necessary to discuss the effect of these several orders, being satisfied that the equity of general lien creditors is regulated by the time of the sale. Though the title is not divested until the conveyance is made, yet, when the deed is executed, the equitable rights of the purchaser relate back to the time of sale. The rule in equity has been to inquire what liens existed at the time of sale, and to make distribution accordingly. If the defect or error in the dockets of the Mack judgments was a vital one, then they were no liens at the time of the sale, and the question is at an end. It is urged, however, that the error, supposing it fatal, was capable of amendment; and the county judge of Tompkins county having, on the 9th of February, 1852, made an order directing the county clerk to correct the dockets, *nunc pro tunc*, it is insisted that the effect of this order was to make the judgments a lien. Without inquiring whether the county judge was the proper officer to order the correction of the dockets, it is manifest that, even if the act of 1844, *ch.* 104, § 7, is retrospective, the order of the county judge was made after ten years since the recovery of the judgments, and of course at a period when, if originally docketed correctly, they would have ceased to become a lien. Before his order, the sale of the lands had been made, the title of the property been passed by the conveyance, the proceeds been paid into court, and the relative rights of all the parties been fixed. I think the case is clearly brought within the language of the Chancellor in *Buchan vs. Sumner*, 2 Barb. Ch., R. 165, where he says, "The rights of the parties to the surplus moneys were in nowise

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SEARS VS. MACK'S ASSIGNEES.

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affected by the order of the Superior Court to amend the docket of the respondent's judgment, *nunc pro tunc*. Before that order was made, the mortgaged premises had been sold and conveyed by the master, and the surplus moneys had been brought into this Court; so that, if the Superior Court had the power, under the Act of April, 1844, to order a judgment to be docketed *nunc pro tunc*, so as to give it a priority as a lien upon real estate over an intermediate judgment, it could not give a lien upon real estate which had been sold and conveyed under a decree upon a prior incumbrance, long before that order was made."

It is clear, in the present case, that the order of the county judge could not make the judgments a lien on the lands, after the lapse of ten years since the recovery of the judgments, and after the lands had been duly sold upon a prior lien. The force and effect claimed for his order, then, are no less than that it made the judgments a lien upon surplus moneys—a subject over which, it seems to me, no jurisdiction was vested in him. In *Buchan vs. Sumner*, the order of the Superior Court amending the docket was made within ten years from the recovery of the judgment; in the present instance it was made after the expiration of the ten years. In other cases, action was had within the ten years. (*Ex parte Butler vs. Lewis Co. C. P.*, 10 *Wend.*, 542. *Roth vs. Schloss*, 6 *Barb.* 308.) In *Hunt vs. Grant*, 19 *Wend.*, 90, the order was made two years after judgment entered. That case establishes the power of the court to make the amendment in a material point, as against subsequent incumbrances; but it may well be doubted, if the relief would have been granted, if the lien, as against subsequent judgments, had expired without any proceedings having been taken to enforce it. The largest effect that can be claimed for the order of amendment of the county judge is, that it would have effected a lien *nunc pro tunc*, if there had been anything for it to act

## SEARS VS. MACK'S ASSIGNEES.

upon. And though I cannot perceive how the making the lien *now* as good as it might have been *then*, could have the effect of extending the lien beyond ten years, as against junior judgments; yet, supposing my view on that point erroneous, it seems a sufficient answer that the lands were sold and conveyed, and the power to amend was invoked too late.

The question then is narrowed down to the point, whether the docket of the judgments made on the 3rd day of May, 1842, were so defective as to prevent a lien attaching on the lands? The statute declares that judgments shall not affect lands, unless docketed "*as herein directed*" (2 R. S., p. 360, §11 [§ 12]); and provides that the clerk shall enter, in an alphabetical docket, a statement of such judgment, containing the names of the parties, "with their places of abode, titles, trades, or professions, if any such are stated in such record," the amount of the judgment and costs, and "the hour and day" of entering such docket. The act of 1840, directing judgments to be docketed in the office of the clerk of the county where the lands are situated, required the clerk to file the transcript and "docket the judgment, in the manner required by law, specifying the court in which the judgment was recovered, the day and the hour on which it was perfected, and the day and hour of docketing the same." (*Laws* 1840, *ch.* 386, § 26.) Supposing "day" to mean date; is an error in the date, of necessity fatal to the regularity of the docket? If everything prescribed to make a perfect docket is essential, a mistake in the hour, the day of the month, or in the abode, title, trade, or profession of the parties, would be fatal. And yet, that can hardly be contended. What terms are mandatory and what directory in a statute, has often been discussed. Negative words make a statute imperative; and in this case the statute uses negative words: "No judgment shall affect any lands, &c., unless the record thereof be filed and docketed, as herein directed." These

## SEARS vs. MACK'S ASSIGNEES.

are imperative words (*Dwarris on Statutes*, 715); but then, do they require a *literal* compliance in every precise particular, or a substantial compliance? (*Ree vs. Birmingham*, 8 B. & C., 29.) A substantial compliance would appear to be sufficient. Form may be of essence, but even then a substantial conformity is enough. (*Davison vs. Gill*, 1 East., 62.) Time may be of essence, but the precise time, in many cases, is not. (*Ree vs. Lowdale, Burr*, 447.) In *Braithwaite vs. Watts*, 2 Crom. 8 *Jervis*, 318, only the issues were docketed, and not the judgments. In *Salé vs. Crompton*, 2 *Strange*, 1209, there was a material error in the name. In *Hunt vs. Grant*, 19 *Wend.* 90, there was a mistake in the amount. In *Landon vs. Ferguson*, 3 *Russ. Ch. R.*, 349, the judgments had not been docketed at all, through the fault of the clerk. In *Buchan vs. Sumner*, 2 *Barb. Ch. R.* 165, the docket was not made under the surname, but the Christian name.

An error in the date of the judgment may be material, as, for example, where the judgment is described as perfected at an earlier period; but in the present case the mistake was in placing it a year later—a circumstance in nowise affecting or prejudicing the junior judgment creditor. The judgment was docketed. The docket stated exactly the names, amount, the day and hour when perfected, but erred in the year, making it 1842 instead of 1841. Though liens on land are given only by statute, and cannot be extended in equity (*Mower vs. Kipp*, 6 *Paige*, 88; 6 *Ohio R.* 162), yet I am loth to hold the mistake of the docket in this case such a substantial and material defect, as to prevent the lien attaching; and must, therefore, decree payment out of the surplus moneys, first to the assignee of the Mack judgments.

## BARSTOW vs. GOODWIN.

*In the matter of the Estate of BENJAMIN LORD, deceased.*

THE testator directed his executors to take possession of his estate, real and personal, and to pay to M. V. V. the net income to be derived from his store in Cedar Street. The premises in question were sold and conveyed by the testator, in his lifetime, and a bond and mortgage taken for the consideration money,—Held, that the devise was revoked by the conveyance.

In case of a devise to brothers and sisters surviving at the testator's decease and the *descendants* of such as should then be dead, such *descendants* to take the share or portion which would have otherwise belonged "to such deceased *parent*,"—at the testator's death there were four surviving sisters,—and descendants, children and grand-children, of six deceased brothers and sisters,—Held that the four sisters each took one tenth, and the descendants of each deceased brother and sister took one tenth.

The term descendants properly includes every person descended from the stock referred to. A devise to descendants *equally* to be divided between them, embraces all the descendants of every degree, *per capita*.

Whether descendants are to take *per capita* or *per stirpes* is, however, a question of intention, to be judged of by the will. A devise to descendants of the share of their deceased *parent*, in connection with other portions of the will tending to show that the testator looked to the principle of representation, may restrain the import of the term descendants to children and the descendants of children, so that they take *per stirpes*, and not *per capita*.

E. C. BENEDICT, *for Executor.*

CHAR. A. PEABODY, JOSEPH DANE, C. W. WOODMAN, *for Legatees.*

THE SURROGATE. The testator, after directing the payment of his debts, disposed of his estate as follows: "Second, it is my will that my executors, hereinafter named, or the survivors or survivor of them, or such of them as shall act for the time being, shall take possession of all my present and hereafter to be acquired estate, real and personal, and receive

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BARSTOW vs. GOODWIN.

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allrents, interest, dividends, and income thereof; and out of the same keep the said real estate in repair, and pay the charges thereon; and keep the personal estate invested, and call in and re-invest the same from time to time, as they shall, in their judgment, think most for the interest of my estate; and distribute, divide, and pay over the said nett income as follows: To Mary Van Veghten, . . . the nett income to be derived from my store, number one hundred and forty-seven Cedar Street, in the city of New York . . . out of the residue and remainder of said nett income of my said estate, pay to Sarah Louisa Reed . . . the sum of two thousand dollars a year, during her natural life; all the rest, residue and remainder of the nett income of my estate pay over to, and distribute and divide among my brothers and sisters who shall be then surviving, and the descendants of such as shall then be dead, and my brother-in-law, Caleb Knapp, of North Stamford, in the State of Connecticut, equally. That is to say, if any of my brothers and sisters shall be dead, leaving them surviving any descendant or descendants, then, such descendant or descendants shall take the share or portion which would otherwise have belonged to such deceased parent. And in case the said Caleb Knapp shall be then dead, leaving him surviving his wife Lavinia, then such share to be paid to her, and if she be dead, then to her descendants. *Third*, upon the death of Mary Van Veghten aforesaid, it is my will that my store, No. 147 Cedar St., be sold, and the proceeds thereof and arising therefrom be equally divided among my brothers and sisters and Lavinia Knapp, wife of the said Caleb Knapp, in the same manner as if the said Lavinia was my own sister and I had died intestate; and, in case either of my brothers or sisters, or the said Lavinia Knapp, shall then be dead, leaving surviving any descendant or descendants, that then and in such case such descendant or descendants shall take the share or portion which would otherwise have belonged to such

## BARSTOW vs. GOODWIN.

parent, the share of the said Lavinia Knapp being subject to the life interest of the said Caleb Knapp therein. The income alone of the said share of Lavinia Knapp shall be paid to her said husband during his natural life, and after his death to the said Lavinia Knapp, and after her death her share to be divided among her heirs. *Fourth*, upon the death of the said Sarah Louisa Reed, it is my will that the whole of the rest, residue, and remainder of my estate, both real and personal, be equally divided among the same persons and in the same manner as directed in the next preceding article of this my will."

The executors were authorized to sell the real estate, if, in their judgment necessary "in order to distribute and divide the same."

The store in Cedar Street, the income of which was given by the second article of the will to Mary Van Veghten, was sold by the testator in his lifetime, and a bond and mortgage were taken for the consideration money. This conveyance effected a revocation of all the devises and provisions contained in the will relative to that lot. This was the rule at common law, and it is <sup>it</sup> recognized by the Revised Statutes. (*Adams vs. Winne*, 7 *Paige*, 97; 2 *R. S.*, p. 65, § 40 [48], 41 [49], 1 *Jarmin*, 130). The title of the testator was wholly divested, by his own act; by the conveyance, he parted with the property; and there is nothing for the devise to act upon. If there had been no will, nothing would have descended to his heirs. The subject-matter is gone, and no substitute has been expressly provided. The alteration was made by the deed, and the provisions of that instrument were wholly inconsistent with the terms and nature of such previous devises. (2 *R. S.*, p. 65, § 40.)

The net income of the estate, after paying the annuity to Mrs. Reed, is to be divided among the testator's brothers and sisters, "then surviving," and his brother-in-law, equally. If any brother or sister died before the testator, without issue, there would be no lapse, but the survivors would

## BARSTOW vs. GOODWIN.

take an increased amount. If any had died leaving issue, the issue was to be substituted to the share of the parent. The gift, in such case, however, is made to the "descendants;" and the question naturally arises, who were intended by this term? Six of the testator's brothers and sisters were dead, at the time of his decease, and they had left children and grandchildren; was it designed that the children and grandchildren should take *per stirpes* or *per capita*? The term descendants properly includes every person descended from the stock referred to. Thus, a devise "to the descendants of Francis Ince," "to be *equally* divided amongst them," has been determined in favor of all the descendants *per capita*, and without reference to the degrees of kindred or to the rule of representation. (*Crossly vs. Clare*, Amb. 397.) A direction to distribute the proceeds of real estate "equally between the descendants of T. F., deceased," has been held to include all the descendants of T. F., children and grandchildren, *per capita*. (*Butler vs. Stratton*, 3 Bro. C. C., 367.) The words "to be equally divided between them," in both the above devises, it may be observed, showed an intention to distribute, *per capita*. Such would be the effect of the word "equally," as used in the second clause of the will now under consideration, were it not for the provision that the descendants shall take the share which "would otherwise have belonged to such deceased parent." The four surviving sisters of the testator will therefore take, each, one tenth of the income; and the descendants of the six deceased brothers and sisters will take the one-tenth their ancestor would have taken if living. But the point again arises, how shall these descendants take, *per stirpes* or *per capita*? The broad import of the term "descendants," is sometimes narrowed, where there is ground for judging that it was intended in a restricted sense. Thus the word "issue," which is co-extensive with "descendants," and includes every degree (*Davenport vs. Hanbury*, 3 Ves., 257; *Freeman vs. Parsley*, 3 Vesey, 421;

*Oddie vs. Woodford*, 3 *My. & Cr.*, 584; *Bernal vs. Bernal*, *Id.*, 559), has been restrained to the sense of "children." (*Horsepool vs. Watson*, 3 *Vesey*, 383; *Farrant vs. Nichols*, 9 *Beav.*, 327; *Edwards vs. Edwards*, 12 *Beav.*, 97; *Swift vs. Swift*, 8 *Simon*, 168; *Goldie vs. Greaves*, 14 *Simon*, 348.) In *Sibley vs. Perry*, 7 *Ves.*, 522, the gift was to J. R. and M., if living, but in the event of death "the lawful issue of every one of them shall equally have and enjoy the share which their respective *parents*, if living, would have had;" and Lord Eldon held that, as the word parent meant father or mother, the correlative term issue meant children. I have no doubt, in the present case, it was intended the children of deceased brothers and sisters should take, and not to let in children, grand-children, and, perhaps, great-grand-children, equally. He directs the division among his brothers and sisters and the descendants of those who should be dead, "*equally*," but immediately qualifies the provision by declaring that, if any of his brothers and sisters should be dead, leaving descendants, the issue should take only the share of the parent. So again, in the third clause of the will, which is in substantial harmony with the second clause, the gift is to his brothers and sisters, and Lavinia Knapp subject to the life-estate of her husband, to be equally divided "in the same manner, as if the said Lavinia had been my own sister and I had died intestate;" and in case of the death of either of the brothers and sisters, leaving descendants, then such descendants to take the share which would have gone to "such parent," and in the case of Lavinia's death, her share to pass to her "heirs." In construing the words "descendants," "heirs," "such deceased parent," and "such parent," and having reference to the substitution of the "descendants" to the share of the "parent," and to the gift of Lavinia's share over to her "heirs," and bearing in mind that equality is carefully prescribed among the brothers and sisters, and omitted when speaking of their descendants,—I think we may reasonably

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BARSTOW vs. GOODWIN.

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conclude the testator intended to regard each deceased brother and sister as a stock of descent, and while using the word "descendants" in the sense of children and the descendants of children still had regard to representation. On a strict construction, perhaps, only the children would take; but, a reasonable regard being had to the mode of division prescribed on the death of a brother or sister, that the descendants should take the share of "such parent;" and to the employment of the term "heirs" in the case of Lavinia, which, in respect to personal estate, is synonymous with "next of kin" (1 *Roper on Legacies*, 88), I am satisfied the nearest approximation to the intention will be attained by holding that the children of deceased children are entitled as "descendants," but only to the share of their deceased parent. In *Stonor vs. Curwen*, 5 *Simon*, 273, where the words were, "devolve to her issue at her death," the Vice Chancellor held that children and grand-children would take *per stirpes*; saying, "It would be unreasonable to suppose that this testator, who evidently has looked to succession, could mean that a child of a deceased child should take co-extensively with the children." (*Cushney vs. Henry*, 4 *Paige*, 345.) Of course, the effort in testamentary cases is always to strive after the testator's intention; and, in doing that, the court may fairly pay attention to the legitimate consequences of adopting a certain rule of construction, and inquire whether it is reasonable to suppose the testator contemplated an interpretation leading to irrational or inconvenient results. It is true, that where the terms used are unequivocal, judicial speculation should not be indulged; but when terms of general and comprehensive meaning have, in certain relations, been used in a restricted sense, a construction accommodated to both senses seems to come nearest the intention of the testator. Whilst holding, therefore, that the term descendants is sufficiently broad to let in children and grand-children, yet, the use of the term "descendants" as a correlative of "parents," in connection with other indica-

tions of the establishment of the principle of representation by the testator, is sufficient to restrain the general import of the word "descendants," so that grand-children, whose parents were living, could not take with their parents. This lets in children to equal shares, and grand-children to the share their parents would have taken if living. The decree should, therefore, declare that the income of the estate became vested, on the testator's decease, in the brothers and sisters then living, and the descendants of those then dead, *per stirpes*. The share of the income bequeathed to Caleb Knapp, on his decease became vested in his wife, and, on her decease, will pass to her heirs or next of kin. This construction might be doubtful, looking at the second clause of the will alone; but it is obvious, by reference to the third clause, that Caleb Knapp's interest in the income was designed to last for his life only.

In respect to the division of the principal of the estate, on the decease of Sarah Louisa Reed, I am of opinion that the descendants of such brothers and sisters of the testator as were dead at his decease, took on the testator's death absolute vested estates; and the decree must provide for the division of the principal among them, upon the same principles as already stated in respect to the income. If any of the testator's brothers or sisters should be living at the time of the division of the principal, they will take equal shares, absolutely. If they should happen to have died, leaving issue, their descendants living at the time of their decease will take the shares of their ancestors, *per stirpes*, on the same principles as laid down in relation to the division of the income.

The share of Mrs. Knapp in the principal will not, however, pass to her absolutely. It is clear, from the third clause of the will, that she only takes a life-estate. The executors will, therefore, pay her the income of that share, during her life; and, on her decease, the title to the principal will vest in her "heirs." In speaking of the income of

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EX PARTE HORNBY.

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this share, the testator limits it, on Mrs. Knapp's decease, to her "descendants," and that, too, in a clause of the will where he uses "descendants" as the correlative of "*parent*." I think all these terms have been employed with the idea of denoting succession; and the persons who would take Mrs. Knapp's estate on her decease, by succession, are the parties entitled to the remainder after her life estate, and they should take *per stirpes*, and not *per capita*. The decree will contain a direction for the disposition of this share of the principal, in conformity with this view.

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*Ex parte* HORNBY.

THE testator, by his will, gave a legacy of five hundred dollars "to his nephew, James Hornby, son of his brother Frederick." It appearing that Frederick had no son named James, and that James had a son named Frederick; and the draughtsman of the will having testified that the testator directed the legacy to "James' son Frederick;" and other satisfactory evidence having been given of the intention of the testator at the time of making the will, showing the legacy was designed for Frederick the son of James,—*Held*, that the words of the clause in question might be transposed, and the mistake corrected so that the will might be read in conformity to the fact.

Generally, parol proof cannot be received to vary a will, where its meaning is plain and its provisions are susceptible of application. But evidence of all material facts is admissible, in aid of the exposition of a will; and it is competent, by means of extrinsic evidence, to place the court in the situation of the testator, so as to facilitate and ensure the ascertainment of his intention.

It is competent to give evidence of the testator's declarations at the time of making the will, where, as the will is written, there is no one to answer the precise description in the instrument.

In construing a will, words may be transposed, to effectuate the testator's intention as gathered from the will and from extrinsic proof, when, as the clause stands, it is inapplicable to an existing state of facts, but if transposed, it will be consistent and applicable

## EX PARTE HORNBY.

THE SURREGATE. Upon the final adjustment of the accounts of the executor, it becomes necessary to pass upon the bequest of five hundred dollars to one of the testator's nephews. The language is, "I give and bequeath to my nephew, *James* Hornby, son of my brother *Frederick*." It appears that the testator's brother *Frederick* had no son named *James*, while his brother *James* had a son named *Frederick*, so that, if the words are read as they stand, there is no legatee to answer the description; while, on the contrary, if they are transposed so as to read, "*Frederick* Hornby, son of my brother *James*," there will be a legatee correctly described. It is shown by the draughtsman of the will, that the testator directed this legacy to "*James*' son *Frederick*;" and that upon engrossing the instrument, error was made in making the gift to *James*, the son of *Frederick*. Other satisfactory evidence is also adduced of the declarations of the testator at the time of making or preparing the will, which shows that he designed the legacy for the son of his brother *James*, and that the description of the legatee is a sheer mistake. But can such evidence be received? The general rule is clear that parol proof cannot be used to vary a will, where its meaning is plain and the provisions are susceptible of application. But it often becomes a necessary and legitimate inquiry to ascertain who are the legatees intended by the testator, when, from misdescription or other circumstances, that point is left in uncertainty. For example, in the present case it is proper to ascertain whether the testator's brother *Frederick* had a son named *James*. If the fact had been so, the investigation would have terminated; and on finding a legatee to answer the description, no proof in contradiction of the will could have been received. But it turns out that there is no person to answer the description as it stands, while if the words are transposed a legatee is found.

It is undoubted, that evidence of all material facts is

## EX PARTE HORNBY.

admissible in aid of the exposition of a will ; and it is competent, by means of extrinsic evidence, to place the court in the situation of the testator, so as to facilitate and ensure the ascertainment of his intention. But the more recent course of decision in the English cases, has tended to limit extrinsic proof to explanatory evidence of facts, and to exclude proof of the testator's intentions and declarations, except in the single instance of a description in the will unambiguous in its application to each of several subjects. (*Miller vs. Travers*, 8 *Bing.*, 244 ; *Doe vs. Needs*, 2 *M. & W.*, 129 ; *Hiscocks vs. Hiscocks*, 5 *M. & W.*, 363 ; *Wigram on Extrinsic Evidence*, 169.) I do not understand the decisions of our own courts to have proceeded to this extent, and think evidence of the testator's declarations at the time of making the will admissible where, as the will stands, there is no one to answer the precise description. (*Jackson vs. White*, 8 *J. R.*, 47 ; *Jackson vs. Sill*, 11 *J. R.*, 201 ; *Mann vs. Mann*, 14 *J. R.*, 1 ; *Doe vs. Roe*, 1 *Wend.*, 541 ; *Williams vs. Crary*, 4 *Wend.*, 443 ; 1 *John. Ch. R.*, 243 ; *Gardner vs. Heyer*, 2 *Paige*, 11.) The distinction that permits evidence of facts, but not of declarations, acts, and statements of the testator, is sustained in the English cases, and by Vice-Chancellor Wigram, in his learned treatise, with force and subtlety ; but I am not aware that it has been adopted as the law of this State.

Aside of the proof afforded of the intentions of the testator in the present instance, the principle that in construing a will words may be transposed, to effectuate the testator's intention as gathered from the will and from existing facts proved extrinsically, comes in to aid the bequest now under consideration. (*Covenhoven vs. Shuler*, 2 *Paige*, 122.) In *Marshall vs. Hopkins*, 15 *East.*, 309, the devise was of a dwelling-house, with lands, in the parish of M. R., then in the occupation of T. W., except one meadow, called Floodgate Meadow. It appeared that T. W. was not in possession of Floodgate Meadow, and it was held that the words,

## EX PARTE HORNBY.

"in occupation of T. W.," might be transferred and applied to the dwelling-house, "according to the fact, which would render the whole consistent." (*Jarman on Wills*, 438, *Doe d. Wolfe vs. Allcock*, 1 *B. & Ald.*, 137; *Bradwin vs. Harpur, Amb.*, 374.) The right to transpose where, from evidence, it appears that the clause of the will, as it stands, is inapplicable to an existing state of facts, but if transposed will be consistent and applicable, is sustained by these cases. The facts, as proved, show a mistake in the will in respect to the description of the legatee. The intention of the testator to give five hundred dollars to one of his nephews, is clear on the face of the will; and as a transposition has the effect of making the will accord with the facts, there would seem to be no substantial reason why that construction should not prevail, rather than defeat the design of the deceased, and have the legacy altogether fail. (*Garth vs. Meyrick*, 1 *Bro. C. C.*, 30; *Humphreys vs. Humphreys*, 2 *Cox*, 184; *Masters vs. Masters*, 1 *P. Wms.*, 421; *Smith vs. Carey*, 6 *Ves.*, 42; *Careless vs. Careless*, 1 *Meriv.*, 384.) I think, therefore, a decree should pass, directing the payment of this legacy to the testator's nephew Frederick, the son of his brother James.

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TURPIN vs. THE PUBLIC ADMINISTRATOR.

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## TURPIN vs. THE PUBLIC ADMINISTRATOR.

*In the matter of the Estate of HENRY TURPIN, deceased.*

ACCORDING to the canon law, a promise of marriage, *per verba de futuro*, i. e. to become husband and wife at some future time, if the promise was followed by consummation, constituted a valid marriage. Whether that is the rule of law existing in this State,—*Quære?*

Where no promise of any kind was proved, except that the claimant declared after the decedent's death, that she was not married to him, but he had said that he had some trouble on his mind, and when that was settled would marry her; and where the parties, though having connection and children, did not live together, but their relation was clandestine, and there was no open acknowledgment or common reputation, and both parties denied marriage,—*Held*, that there was not sufficient in the circumstances, from which to infer a marriage.

When parties are living in a meretricious state, a promise to marry on a future condition, does not effect a marriage by a mere continuation of that connection.

ALANSON NASH, *for Claimant.*

H. H. ANDERSON, *for Public Administrator.*

THE SURROGATE. There are in this case, two applications for administration; one by the Public Administrator, and the other by a party claiming to be the widow of the deceased. There is no proof of a formal or ceremonial marriage, nor a pretence of any. Nor did the parties cohabit with each other. The decedent resided at his boarding-house; and the claimant lived separately, keeping a small store from which she generally derived means of support. Turpin passed among his friends as an unmarried man. The claimant ordinarily went by the name of a deceased husband, Morrison. Turpin generally spent his

## TURPIN vs. THE PUBLIC ADMINISTRATOR.

evenings at her room, had connection with her for several years, and was the father of one, if not of two, of her children. She washed for him; he gave her money and clothes occasionally; he took her out several times, but brought no friends to the house, and did not publicly recognise her as his wife. The connection was in fact clandestine. It is proved that after his decease, she explicitly declared she had not been married to him.

On the other hand, it appears that the youngest child was baptized in his name, and the same evening he sat down with the family to a supper on the occasion, in the course of which, as testified to by one witness, he once addressed her as Mrs. Turpin.

This is about the substance of all the important facts in the case, and the question is whether they afford sufficient ground for presuming or inferring a marriage in fact.

After Mr. Turpin's death, the claimant stated to his landlady, that she was not married to him, but said, he had stated that "He had a little trouble on his mind, and when that was settled he would marry me, and no woman should stand before me." The counsel for the claimant insists that this statement brings the case within the rule adopted by the canonists, that "a promise *per verba de futuro*, which was an agreement to become husband and wife at some future time, if the promise was *followed* by consummation constituted marriage, without the intervention of a priest." (*Poynter on Marriage and Divorce*, p. 13.)

It is somewhat curious in this connection to observe that our statute declares that, "any man who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor," &c. (*Laws of 1848, Ch. 111.*) This language is sufficiently general to cover the case of a promise to marry *in futuro*, followed by consummation, which, as seen, according to the canon law constitutes a perfect marriage; so that under such a construction of the

## TURPIN vs. THE PUBLIC ADMINISTRATOR.

act, a man would be punished for marrying. It is true, there may be connection not in performance of the promise, the promise being still treated as executory. (*Queen vs. Millis*, 10 *Cl. & F.* 782, 905); and if the act of the Legislature is to be considered as referring only to that class of cases, it may not be in derogation of the rule of the canon law. Without examining that question more minutely, and treating this case on the hypothesis that a promise to marry *per verba de futuro, cum copula*, constitutes a perfect marriage, I do not find sufficient in the evidence to sanction the conclusion that there was between the decedent and the claimant, a marriage of that character. No promise of any kind is proved, except that the claimant declared after the decedent's death, that she was not married to him, but that he said, "he had a little trouble on his mind, and when that was settled, he would marry her." It does not appear when this statement was made, whether before or after the commencement of their connection; and when parties are living in a meretricious state, a promise to marry on some future condition, does not effect a marriage by a mere continuation of that connection. Besides, all that is known on this point is from the declaration of the claimant made after the decedent's death, and in conjunction with a denial of marriage. There was no cohabitation or *consortium vite*—no public living together—no general and open acknowledgement, or common reputation. The connection was as clandestine as under the circumstances it could be. Both parties denied that there was a marriage; and even on the supposition that the claimant in making this denial referred to a ceremonial marriage, there is not enough in the circumstances proved before me, to infer that there was such an agreement as in law constituted the parties man and wife. I must therefore pronounce against the claimant.

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WILSON vs. HETTERICK.

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## WILSON v. HETTERICK.

*In the matter of proving the last Will and Testament of  
NATHANIEL WILSON, deceased.*

WHERE there has been such a lapse of time between the execution of the will and the examination of the subscribing witnesses, as to justify the inference that their recollection may be imperfect, due celebration of the necessary forms may be presumed, unless there be evidence repugnant to such a presumption. There must be enough in the remote date of the transaction and in the circumstances, to lay the defect of the proof upon the infirmity of the human memory.

Not more than three months intervening between the execution of the will and the probate, and the witnesses agreeing substantially in their statements, and seeming to remember the circumstances with essential accuracy,—Held that due execution could not be presumed, and there being no evidence of a testamentary declaration, that the will was not validly executed.

The testamentary declaration is essential to due execution. It must be made at the time, be open and manifest. The testator must declare the instrument to be his will; and it is not sufficient, for the witnesses to conjecture the character of the instrument.

F. A. TALLMADGE, *for Executor.*

J. H. McCUNN and EDWARD SANDFORD, *for Heirs.*

**THE SURREGATE.** The probate of the will of the decedent is opposed, on the ground of insufficient proof of formal execution, pursuant to the provisions of the statute.

The decedent signed the will in the presence of the subscribing witnesses, and they subscribed in his presence and at his request. Neither of the witnesses proves any testamentary declaration.

The decedent was in bed, sick. He sent for the witnesses. They came. He took the instrument from under his pillow, and said he had "an instrument in writing" he wanted them to witness. He took the paper from an

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WILSON vs. HETTERICK.

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envelope, opened it, handed it open to one of the witnesses, Mr. Perry, who put it on the table. The witnesses subscribed it, and it was returned to the decedent, who replaced it in the envelope.

Mr. Drake, one of the witnesses, states that the decedent called the document "an instrument in writing,"—that no part of it was read aloud, and the decedent did not request him to read any part of it,—that he did not read any part of it; but, while he was signing, he took a glance at the attestation clause, and, from the heading of the document, "Know all men by these presents," and from what he read below, he judged it to be a will. In respect to the attestation clause, he says, "I read the first line straight through, and caught the rest as I was signing—backwards and forwards. I read the heading of the will,—that is, the first line. I read the words, 'attesting witnesses,' at the end of the attestation clause. Those are all the words I read in the attestation clause." This witness states, that if the decedent had been in perfect health, and had requested him to sign the paper, he would have known it to be his will. When interrogated whether the decedent declared it to be his last will and testament, he answered, "I did not hear him make use of those words. Did he say it was his will? He said it was an instrument of writing. Did he say of what kind or purport? I don't recollect that he did. Can you say that he did not say it was his will? No. I cannot say that. Do you mean, then, only to say that you do not recollect he declared it to be his will? I was in only for a moment. May he have declared it to be his will, and you have forgotten it? I think, under the circumstances, he might, for I was somewhat affected."

Mr. Perry testifies that he went into the decedent's room before the arrival of the other witness. The decedent said "he had sent in for Mr. Drake, that he wished me and Mr. Drake to witness an instrument in writing that he had. He did not say what it was, nor did I ask him."

## WILSON vs. HETTERICK.

After he had stated with particularity the circumstances that transpired in respect to the execution of the will, the following questions were put to the witness, and answers given: "Did the decedent say what the paper was? I don't recollect that he did. Did you know it to be his will? I read a line or so of the last part of it, but not enough to know it was his will. I could not say positively it was his will. Can you be positive he did not say it was his will in the presence of yourself and Mr. Drake? I don't think the word *will* was mentioned. I could not be positive he did not say that paper was his will. I don't recollect his speaking the word *will*, while I was in his house. It might have been passed. He did not ask me to read any part of it. I had reason to suppose it was his will, because he was very sick, and was not expected to live, and from previous conversations between me and him. I don't recollect any other particular reason for supposing it was his will. If I had been called to witness this instrument under other circumstances, I don't think I should have concluded it was his will." Again, "If the decedent had said to me in so many words, 'this is my last will and testament, and I want you to subscribe to it,' I think I should have remembered it. From what he then said, disconnected from any previous conversation, and from what you saw in the paper, did you infer or not, it was his last will and testament? I inferred it was his will; but could not have so inferred from what he then said, and what I saw of the paper, had it not been for other and previous circumstances. What other circumstances combined with these produced this inference? One circumstance was, that we had often conversed together of the difficulty in settling estates without wills. We had several such conversations during the time he was complaining, probably two or three months previous."

The instrument offered for proof was executed on the 7th of July last, and the witnesses were examined on the

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WILSON vs. HETTERICK.

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30th of September. Where there has been such a lapse of time, between the act and the time the witness is called upon to testify concerning it, as to justify the inference that his recollection of the circumstances may be imperfect, due celebration of the forms necessary to make a valid will may be presumed, unless there be evidence repugnant to such a presumption. To authorize an inference of this kind, however, it is not sufficient for the witnesses merely to say, they do not recollect, or that the requisite form may have been complied with and have escaped their memory. But there must be enough in the circumstances, and the remote date of the transaction, to lay the defect in the proof upon the infirmity of the human memory. In the present case, scarcely three months had intervened between the signature of the paper, and the examination of the witnesses. They seem to remember the circumstances with essential accuracy, and agree substantially in their statements. They concur in saying that the decedent termed the document he requested them to attest, "an instrument in writing," and that he did not declare it to be his will. That he termed it an instrument in writing they assert without qualification; that he did not declare it to be his will they do not state positively, though I think it manifest they were both of opinion that he did not. If we speculate as to probabilities, it would appear strange if they should remember that he called the paper an instrument—a general term—and forget that he declared it to be his will—a special term, and clothing the document with a special interest. And as they recollect other and unimportant particulars with considerable minuteness, how unlikely is it they have forgotten an essential declaration, of a character to attract their attention, and impress their feelings and memory! One of the witnesses testifies that he should not have inferred the instrument to be a will, from what transpired at the execution, disconnected from other and previous circumstances. The other witness says

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WILSON vs. HETTERICK.

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that he supposed it to be a will from what he saw of it whilst about to attest it. The parts of it which he says he read or glanced at, would not justify such a presumption. But the ascertainment by the subscribing witnesses of the testamentary nature of the paper, must not be conjectural or derived from accidental inspection. The testamentary declaration must be open and manifest, and intentional. The minds of the parties must meet on that point. The declaration must be made at the time, and it is an essential part of the transaction then attempted. The witnesses cannot spell it out by a hasty glance at a word here and there, or by connecting present acts with previous conversations. The testator must know that the witnesses know the testamentary nature of the act—and *vice versa*; and this mutual knowledge must arise from something said, done, or signified contemporaneously with the execution of the instrument. I am satisfied, from the evidence, that there was no testamentary declaration made by the decedent, at the time he subscribed the will now before me. And though it may seem hard to deny probate because of the omission of such a ceremony, in a case where the entire will is in the decedent's own writing, and there can be no doubt of his intention; yet the statute acts upon general rules and principles, and it is beyond the discretion of the judge to relax its force, to suit his views of the hardship of a particular case plainly within the scope of the statute. I must therefore pronounce sentence rejecting the will.

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 MERCHANT vs. MERCHANT.
 

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## MERCHANT vs. MERCHANT.

*In the Matter of the Estate of AARON MERCHANT, deceased.*

THE testator, having made an unequal will, gave to his son, during his last illness, three bonds. Subsequently, having executed another will, placing the donee nearly on an equal footing with his sisters, the bonds were brought to him by his wife, with whom the donee had deposited them; and he directed them to be put back in the box where he kept his valuable papers. The day before his death he directed one of his daughters to bring him the box, and see if the bonds were there. They were shown to him: he said it was right, directed them to be replaced, the box to be locked, and the key to be given, on his decease, to R., one of his executors,—*Held*, as the gift was made during the last illness, from which the testator did not expect to recover, that by presumption of law, it was intended as a *donatio mortis causa*, was revocable in its nature, and was in fact revoked before the donor's death.

A will does not revoke a gift *causâ mortis*; because the will does not speak till the testator's death—the moment the donation by its terms has become absolute.

A *donatio mortis causâ* is revocable at the option of the donor and without the consent of the donee, whether the donor recover or not.

There are three conditions annexed by law to a gift *causâ mortis*, which on happening defeat the donation: the recovery of the donor, his repentance of the gift, and the death of the donee before the donor's decease.

On an accounting, the Surrogate has jurisdiction to try every question necessary to the settlement of the accounts. The legatees can adduce evidence to charge the executor with more assets than he acknowledges to have received; and it is competent for him, on the other hand, to show in defence that the assets were his own property, and not part of the testator's estate, at the time of the death.

THOS. W. HIGGINS, for W. H. Merchant.

I. The Surrogate has no right by the revised statutes to try this case, as it involves the trial of a disputed claim.

## MERCHANT vs. MERCHANT.

(*Magee vs. Vedder*, 6 Bar., p. 352; *Opinion of D. B. Ogden In the Matter of the Estate of John Kent, deceased*, *Dayton's Surrogate, Appendix*, p. vii.; 5th N. Y. Legal Observer, p. 124.)

II. To constitute a valid *donatio mortis causâ* there must be a transfer of the dominion over the subject of the gift. (*Wms. on Ex.*, p. 654.) The dominion over the subject of the gift is acquired by donee immediately on the delivery and acceptance of the gift. (See *Reddel vs. Dobree*, 10 *Simons*, p. 244.)

III. If the donee acquires dominion over the subject of the gift, it is a contradiction of terms to suppose that donor continues his right to control it: donor cannot recall the gift at will. (See *Reddel vs. Dobree*, 10 *Simons*, p. 244.)

IV. The doctrine that a gift *mortis causâ* is revoked by the resumption of possession, is nowhere found in our elementary works on this subject.

The only authority for the doctrine that "Resumption of possession by donor is a revocation of the gift," is found in the case of *Ward vs. Turner*, 2 Ves. sen., p. 431. This is the case referred to by all writers that hold this doctrine. The case referred to in 2d Vesey will admit of no such construction. Lord Hardwicke held, that because the donee did not "regard and take care of the gift," and thus suffered it to return to donor, the gift was revoked.

V. Possession must be resumed by donor with the knowledge and consent of donee; otherwise, donee has not parted with his right to dominion over the subject of the gift.

VI. A *donatio mortis causâ* is unlike a will, in that it takes effect immediately on delivery. (*Wms. on Ex.*, p. 658.)

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MERCHANT vs. MERCHANT.

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VII. A *donatio mortis causa* is like a will, revocable, but it is not revocable as a will.

VIII. A *donatio mortis causa* is revocable only in four ways.

1st. By death of donee before death of donor.

2d. By the recovery of donor from his then sickness.

3d. By the birth of a subsequent heir.

4th. By the resumption of the possession of the gift, which must be done with the knowledge and consent of donee.

IX. A gift *mortis causa* differs from a nuncupative will, inasmuch as there must be a *delivery* of the subject; and the effect of the delivery is that it takes away the *locus penitentiae* from donor; and the only way in which the gift can be recalled or revoked is by one of the four ways mentioned above.

X. The right of dominion over the bonds in question was never parted with by donee; and their possession was never legally resumed by donor, as donee never knew that donor had them in his possession, but always supposed that he had them in his own possession.

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HORACE HOLDEN and ROBERT DODGE, for Legatees.

I. There is no legal evidence of any gifts whatever of the bonds claimed by the executor, William H. Merchant.

Whatever effect may be given to declarations of legatees, they must be distinctly proved; and if the declarations of several legatees are offered, it must first be proved that they were all together when made, and that they spoke the same thing together, before you can, as attempt-

## MERCHANT vs. MERCHANT.

ed here, admit such a random statement as made by the witness Reading, "Mrs. and Mary Eliza Merchant both told me:" &c.

(a) There is no evidence offered of any facts and circumstances of these declarations, no date given, no words proved, no evidence that they saw or heard the testator make any gift, no time stated of any gift; and the whole evidence offered is comprised in the words of the witness, "I understood that it was a full and free gift," &c., without stating any source of such understanding; and as to the other daughter, Selina, who is sought to be charged also by the alleged declaration of the mother and sister, the witness says, "I don't know that she knew of the gift."

*Thompson vs. Heffernan*, 4 *Drury & Warren*, p. 285 (1843), by Sugden, "To support such a disposition, I should require not a mere general statement of the fact of a gift having been made, but to be informed of the most minute particulars,—the amount, how it was given, when, where, and in whose presence, and in what condition of mind and body the alleged donor was; in fact, all such particulars as might be expected in a fair transaction."

This evidence is merely confused hearsay. (*Walsh vs. Studdart*, 4 *Drury & Warren*, 171; *Walter vs. Hodge*, 2 *Swanston*, 97.)

"On principle, it is quite clear that a claimant insisting on such a parol gift, must establish a clear and satisfactory case. The court expects satisfactory evidence of an act constituting a transfer of the property." (*Shirley vs. Whitehead*, 1 *Iredell's Eq.*, 130.) "A gift by a man in his last sickness, to a person in attendance upon him, will be viewed with suspicion, and will not be sustained without full and conclusive evidence."

II. There is no proof of delivery. To make out any gift of these bonds, delivery must be positively proved, and fully as to time and manner.

## MERCHANT vs. MERCHANT.

The only evidence of delivery is this: the same witness testified "hearing that these bonds had been in his possession, I infer there was a delivery." "William H. came home a day or two after the 1st of December, and that is the reason why I fix the gift after that time. I cannot tell at what time the gift was made. The testator never said anything to me about these bonds."

Nothing is better settled than that this claimant, an executor, and therefore a trustee of the personalty under the will, must make out his claim fully in all the circumstances; otherwise, a door would be opened to perjury and fraud, greater than the statutes have provided against. (*Jones vs. Selby*, *Finch's Prec. in Ch.*, 300, and the cases cited on Point I.)

He must produce competent legal evidence. His own oath, in any way cannot be taken. It is like the case of an executor claiming to retain for his own debt or claim.

"To constitute a valid gift, there must be a delivery of the subject; and in such circumstances that donor prefers the possession to the donee. There must be an absolute and unconditional delivery of possession to donee, and the possession of donee must continue until the death." (2 *R. S.*, 88, § 35; 6 *Paige*, 166; *Farquharson vs. Cave*, 2 *Collyer*, p. 356, *Shadwell, V. C.*)

To constitute a delivery, "the donor must not only part with the possession, but with the dominion of the property." (2 *Kent*, 438. 2 *Gill & Johnson*, 508; 5 *Ibid*, 54." *Bunn vs. Markham*, 7 *Taunton*, 224; *Walter vs. Hodge*, 2 *Swanston*, 106; *Hawkins vs. Blewit*, 1 & 2 *Esp N. P. C.*, 663).

A gift resting *only in mental intention*, and not perfected by an *entire* delivery of dominion and control, is not a gift. There exists *locus penitentiae*, and no court will aid to carry it out. (2 *Kent's Com.*, 438).

The delivery rests on the inference from unknown premises by the witness Reading.

There is no evidence of any possession by donee before the death, or of any delivery.

That delivery is essential, and must be fully and clearly proved by claimant, and its legal character. See 2 *Kent's Com.*, 438, 9, 446; 1 *Williams' Ex'rs*, 500; 1 *Roper's Legacies*, p. 4; 10 *Simons*, 244; *Bunn vs. Markham*, 7 *Taunton*, 224; *Bryson vs. Brownrigg*, 9 *Ves.*, 1; 1 *Roper*, p. 6; *Edwards vs. Jones*, 1 *Mylne & Craig*, 226.

III. *But assuming* there was a gift of these bonds by the testator to his son, some time between the 1st and 16th days of December, 1851,—

The witnesses, Reading, Hewitt, and Dr. Palmer, his attending physician, all unite in proving that during that fortnight, and the month of December, 1851, the testator was prostrated with his *last illness*, of which he died 8th January, 1852. That the testator uniformly *expressed his belief that he should positively and speedily die of that illness; that he was continually under the belief of the near approach of death*, of which he frequently conversed, and of a *future state*.

This evidence clearly shows this alleged gift to have been *mortis causâ*. There is no evidence of the contrary.

The definition of *donatio mortis causâ* by Roper, which is uniformly adopted by all authors, being the definition of the Pandects of Justinian, is, "Where a person, being in peril of death, in *prospectu mortis*, or during his last illness, gives something, yet not so that it should be presently his who received, but in case only the giver die."

"But it is not necessary for the donor to expressly declare that the gift was made conditionally, viz., to take effect only in the event of his death; for if the gift be made during his last illness, the law infers the condition that the donee is only to hold the subject in case the donor die of that indisposition.

"The donee must either continue in possession of the

## MERCHANT VS. MERCHANT.

subject from its delivery till the *death of the donor or by redelivery be in possession* of it at the time of death of donor, consequently if the donor resume the possession and continue it until his decease, the gift will be revoked, and for the following reason; the gift *not being made to take effect immediately*, but being *inchoate*, dependent on the event of the donor's death, *locus pœnitentiæ* was reserved to him, of which *change of mind the resumption of possession being evidence*, determined the donation."

"Nothing can be more clear than that this *donatio mortis causâ* must be a gift made by a donor in contemplation of the conceived approach of death, that the title is *not* complete till he is actually dead." (*Duffield v. Elwes*, 1 *Blighs*, N. S. (H. Lords), 1827, p. 497, by Eldon. *Farquharson v. Cave.*, 2 *Collyer*, p. 356.)

And further, "To constitute a valid *donatio mortis causâ*, there must be a delivery, an *absolute and unconditional* delivery, of possession to donee, and the possession of donee *must continue until the death.*"

"That it is ambulatory, incomplete, and revocable during the testator's life. This revocation may be effected either by the donor's recovery or by resumption of the possession. That it may be satisfied by a legacy given to the donee.

"*That it is in the nature of a legacy.*" (1 *Roper on Legacies*, pp. 2, 3, 6, 8, 20, 23. 1 *Williams' Executors*, ed. 1832, marg. p. 499, and affirmed in *Harris v. Clark*, 3 *Comstock*, 93. 2 *Kent's Comm.* 447, marg. p. 1 *Story*, *Eq. Jur.*, § 607.)

(a) It is in evidence that these bonds were in the possession of the testator and in the box containing all his securities and assets, *at the time of his death*; and were *never removed therefrom until the morning after his death*, when this claimant took *them out* into his possession for the first time; and they were included by the testator in the last

## MERCHANT vs. MERCHANT.

schedule of his property, made by himself shortly before his death.

(b) It is also in evidence, that just after and about the date of the execution of the will, 16th December, 1851, more than *three weeks before his death*, the testator on being shown these three bonds by his wife, who then held them in her hand, and being asked by her "whether she should hand over to each of the children one of the \$1,000 bonds, now that the will gives to the three children alike?" answered, "No; put them *back in my tin box*," which was the depository of the rest of his assets, and whence she had taken them.

And further, That the *day before his death* the testator, to be assured that his wife had complied with his directions to *replace* these bonds, and that they were still in his possession, *and that he should die* in their possession, called his daughter, Mary Eliza, to his bedside, told her "to get his tin box and bring it to him, to open it, and see if these bonds were in there; that she brought and opened the tin box, and *showed him these bonds then in it*; that testator then said 'all right,' and told her to *put the bonds back into the tin box, to lock the box, and keep the key till after his death*, and then deliver it to Richard A. Reading, his executor." She did so lock the box and keep the key, until at her mother's request, after the death, she gave it to William H. Merchant, claimant, who thereby alone, and *for the first time*, obtained possession.

It is further proved, that after the gift was made testator executed his last will, which divided his estate *equally* among his *three children*, giving to *his son* an *equal share* with the others; and that upon and at the time of its execution he expressed himself in the strongest manner to the witnesses Reading and Hewitt: "That I can now die with more satisfaction, for my son has an equal share of my estate." And in his instructions to Reading to draw the last will, "He stated that there was a will in existence

## MERCHANT vs. MERCHANT.

which materially cut the son short from an equal share with the rest of the family, and he wanted him to draw another will making them all equal."

From this evidence, which is undisputed, it follows plainly.

1st. That this *donatio mortis causa* of these bonds was revoked in the clearest manner.

(a) By resumption of the possession thereof by testator three weeks before his death, in presence of his wife, and

(b) By resumption of possession the day before his death in presence of his daughter.

(c) That he died in full possession; and this claimant never had any possession at all of these bonds until the morning after his death.

(d) That the testator never intended to make him any such gift, for he executed the last will and directed it to be prepared, with the sole object of *dividing all* his property *equally* among *his three* children, and the will which is now on record so divides all his property; and upon its execution on the 16th December, 1851, which is after the presumed date of the alleged gift, he expressed himself that he should "die now with satisfaction, as he had made his son equal with the rest."

The legacy of one-fourth of his entire large estate equally with the rest of his family, was a satisfaction of any claim of this son, and was so intended by the testator, by all his previous and subsequent acts. (*Jones v. Selby, Finch's Prec. Ch.*, 300, reported in *Roper on Legacies*, p. 14.)

This loose story of a gift at all, is *directly opposed to all the testator's declarations and acts*, and is therefore IMPOSSIBLE. (*Farquharson v. Cave, ut supra.*) "All the acts of testator are consistent, and show his understanding that the bonds would be in his own custody or under his own control at his death, and be delivered at his death to his executor. There could be no gift of any kind."

## MERCHANT vs. MERCHANT.

This evidence makes this case like that of *Bunn v. Markham*, 7 *Taunton*, 224, reported in *Roper, Legacies*, p. 6. (*Farquharson v. Cave*, 2 *Collyer*, p. 356, *Walter v. Hodge*, 2 *Swanston* 106, *Walsh v. Studdart*, 4 *Drury & Warren*, 171.)

4. This is, then, a case of willful and fraudulent conversion of the assets of testator by the executor, after the death, to his own use.

It is a case of devastavit for which this executor is personally liable; and there should be a decree against him personally, in favor of the distributees, for the amount in value of these bonds, with interest from the date of the decease. (*Thorp v. Amos*, 1 *Sand. Ch.*, 26, 32; 2 *R. S.*, p. 72, § 17. *Ibid.* p. 449, § 17. *Dayton*, p. 216, and *seq.*)

**THE SURREGATE.** On the final accounting of the executor William H. Merchant, the legatees seek to charge him with three thousand dollars, the amount of three Erie Railroad income bonds, which they allege were the property of the deceased.

To prove this, the claimants produced the inventory; but, the entry thereon showing that the executor claimed the bonds as a gift from the testator, the proof was insufficient. Mr. Dodge then testified that the executor, after the testator's death, called at his office and stated that he had taken the bonds in question out of the box containing the securities of the estate, on the morning after the decease of his father—the executor alleging as a reason, that he claimed them as his own, as a gift from his parent.

It was then proved on the part of the executor, by the evidence of his co-executor, Mr. Reading, that two of the legatees had stated that the testator gave to his son, William, the bonds in question, some short time previous to the

## MERCHANT vs. MERCHANT.

making of his last will—within a month before; that it was a full and free gift, and William had handed the bonds to his mother; that subsequently and after the testator made his last will, his wife took the bonds, conversed with him about the will as it then stood, and, holding the bonds in her hand, said, "Now, that the will gives each child alike, shall I hand over to each child a thousand-dollar bond?" The testator said, "No, put them back in my tin box." It also appears that, the day before the testator's death, he directed one of his daughters to bring the box, open it, and see if the bonds were there. She opened it and shewed him the bonds; and he said it was all right, and told her to put them back in the box, keep the key, and at his decease deliver it to Mr. Reading, one of his executors—that she kept the key till after her father's death, when she gave the key, at her mother's request, to her brother William, the other executor.

It is certain that the bonds in question once belonged to the testator, and they were entered by him on a schedule of his assets. The testator having made a will by which his son had not been placed on an equal footing with his daughters, and having subsequently become reconciled to his son, made the gift of these bonds, when his will remained in that condition. He afterwards revoked that will and executed another, in which his children were treated alike, except that the daughters were given the use of his dwelling-house and furniture in common with their mother. After the new will had been made, Mrs. Merchant brought the bonds to the testator, and the conversations and circumstances occurred which I have before stated.

1. Was the gift to the son a donation *inter vivos* or *mortis causa*? It is proved, that the testator was at the time in his last sickness, and that during the whole course of his illness, he did not expect to recover. In such a case, the presumption of law is that the gift was intended as a *donatio mortis causa*. (1. *Roper on Leg.*, 22.)

2. It having been shown, that after the gift the testator resumed possession, it is urged on one side, that the gift was revoked; and on the other, that possession having been obtained by the donor without the consent or privity of the donee, the gift was not legally revoked. The last point involves the proposition that the donor cannot revoke the gift without the consent of the donee.

I would remark, in the first place, that if this be so, it is a solitary exception to dispositions of property made in view of death, by the voluntary bounty of the donor.

It is true that a will does not revoke a *donatio mortis causa*; but the reason is that the will does not speak till the testator's death—till the very moment the donation by its terms has become absolute—when of course it is too late to revoke it. On the donor's death, the donee's title becomes absolute, and therefore irrevocable by a will, which from its nature is inoperative during the donor's life time, the only period during which the donation could be revoked.

It is insisted, however, that, inasmuch as the entire dominion of the donor over the property is transferred to the donee, no right of revocation exists. But this rule, as I understand it, does not mean that the donor reserves no right of revocation—but only that he parts with the control and possession of the property (*Williams on Ex.*, 654)—that there is not a partial but absolute delivery and change of possession. If such an absolute delivery is inconsistent with a power of revocation by simple reclamation, it is just as inconsistent with a revocation in case of the donor's recovery. Such an argument would destroy the peculiar character of this class of donations, and transform them into pure irrevocable gifts *inter vivos*.

The truth is, that the whole of this doctrine of revocation is a rule of law. The law declares that a donation *mortis causa*, is revocable in case the donor recover—and that, too, notwithstanding the gift was in express terms absolute, and the delivery was absolute. I do not see in any case

## MERCHANT vs. MERCHANT.

that the power of revocation is inconsistent with absolute dominion in the donee, existing under a condition annexed by the law to the gift, that the donor may resume the property. An attorney in fact, for the time being has full authority and absolute dominion within the scope of his power; and yet the power may be revoked at any instant. In the sense contended for by the counsel of the executor, a donee has not absolute dominion over the subject of the gift: though his possession for the time is absolute, his title does not become perfect till the donor's death. Before that period, he cannot dispose of the property. If that event should not happen, the donor may resume his gift.

It is conceded on all hands, that if the donor recover the gift will be defeated. This is a condition the law implies; and if the law likewise implies that the gift may be reclaimed at the pleasure of the donor—the latter condition is no more incongruous with the possession and dominion of the donee than the former.

It is admitted that the gift may be revoked in the donor's lifetime, by resumption of possession; but if that means, that the subject of the gift must come back into the possession of the donor by the consent of the donee, it amounts only to the simple truism, that both parties can by mutual agreement annul the transaction. But if by resumption of possession, a reclamation of possession is intended, then the gift can be revoked at the option of the donor. This seems to be the view taken in *Bunn vs. Markham*, 7 *Taunton*, 224, where Gibbs, C. J., says, "It is in the power of the donor at any time to revoke the donation before his death." In *Ward vs. Turner*, 2 *Vesey, sen.*, 433, Lord Hardwicke does not declare that an actual resumption of possession is necessary to constitute a valid revocation; but on the contrary he cites the Commentary of Vinius to the effect, that the donor where the gift was defeated by "recovery or revocation," had his action against the donee. (*Ibid.*, p. 439.)

Suppose the donee dies before the donor, does the gift

## MERCHANT vs. MERCHANT.

stand. In the case of a will, the prior decease of the legatee causes the legacy to lapse. This was the rule of the civil law in respect to donations *mortis causâ*; and in the same breath this was declared, the power of the donor to revoke was likewise expressed. The terms or conditions on which the donor can recover the subject of the gift are thus stated in the Institutes: *Sin autem supervivisset is qui donavit, reciperet; vel si eum donationis penituisse, aut prior decesserit is cui donatum sit.* (*Inst., lib. 2, tit. 7, § 1.*) Again, in the Digest, it is laid down, *Mortis causâ donatio, etiam dum pendet an convalescere possit donator, revocari potest.* (*Digest, l. 39, tit. 6, § 16, item § 30.*)

The three conditions annexed to the gift by the civil law, which on happening defeat the donation, are: 1st, The recovery of the donor; 2d, His repentance of the gift; 3d, The death of the donee before the donor's decease. These are separate and independent conditions. Ayliffe says, The gift "may be revoked by the donor's repenting thereof." (*Parergon*, 331. *Bracton, lib. 2, cap. 26, § 1.*) In *Jones vs. Selby, Prec. Ch.*, 300, the Chancellor said, "You agree that a *donatio causâ mortis* is a gift *in presenti*, to take effect *in futuro* after the party's death, as a will; and that it is *revocable during his life*, as a will is." Chancellor Kent speaks of these gifts as "conditional and revocable and of a testamentary character." (*2 Com.*, 445.) In *Wells vs. Tucker*, 3 *Binney*, 370, Justice Tilghman says, "it is contended on the part of the plaintiff, that a gift of this kind passes the property *immediately*, and is not subject to revocation by the donor. Without absolutely committing myself, I incline to the opinion, that in this as in several other particulars, it partakes of the nature of a legacy, and is revocable." In the same case, Justice Yeates describes the donation as "subject to countermand and revocation." In *Nicholas vs. Adams*, 2 *Wharton*, 22, Justice Gibson states accurately the three modes of defeasance acknowledged by the civil law. His language is, that it is "de-

## MERCHANT vs. MERCHANT.

feasible by reclamation—the contingency of survivorship—or deliverance from the peril.”

I find nothing against this doctrine—unless it be the language of the Vice Chancellor, in *Reddel vs. Dobree*, 10 *Simons*, 244, who, speaking of an alleged donation, characterized it as a gift which “was always liable during the lifetime of the testator to be recalled by him;” and “therefore the very essence of a *donatio mortis causâ*,” was wanting. The gift in that case, was of money that might happen to be in a certain box at the testator’s death, and on condition that up to the time of his death, he should retain “the complete dominion over whatever might be placed in the box.” The opinion of the Vice Chancellor is, substantially, that the reservation of this dominion is inconsistent with the essence of a *donatio mortis causâ*. If no more than that was intended, the doctrine is but another form of stating that there must be a complete delivery. If it was designed to declare that when there had been a complete delivery, the donor could not revoke the gift, such an opinion was not called for by the case in hand, and is not agreeable with the authorities. There are several cases besides that of *Reddel vs. Dobree*, which might be supposed to imply that the donor had no right to revoke (4 *Dru. & W.*, 159, 285; 2 *Coll.* 356; 8 *Mee. & W.*, 401); but I think they proceed on the ground that there must be an absolute delivery, a change of possession and dominion, so as to vest the full possessory title in the donee, subject only to such rules as the law applies to this class of gifts. That a *donatio mortis causâ* cannot be revoked at the will of the donor, I find no where decided, or distinctly asserted; while the rule of the civil law, that it could be revoked if the donor repented, even while it was uncertain whether or not he would recover, is clearly laid down in the Digest, and has been admitted to be the rule at common law, by a number of distinguished

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MERCHANT vs. MERCHANT.

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judges, although I am not aware the point has expressly arisen as the subject of distinct decision.

Applying this rule to the facts in evidence, I am of opinion that the testator conceived this gift to be revoked. After making the donation, he made a change in his will, and substantial alterations as to the disposition of his property, in favor of the donee. When that act was accomplished, his wife brought these bonds to him, and asked whether she should distribute them among his children. He said, "No," and directed them to be placed in the depository where he kept his valuable papers. That direction was not only a resumption of the possession, but an indication of a change in his views in respect to the disposition of the property. His subsequent conduct, in calling for the box, inquiring whether the bonds were there, and directing his daughter to lock the box, and give the key not to his son, but to the other executor, after his death, confirms the idea of revocation, and shows he intended the bonds to come into the possession of his executor, after his decease, as a part of his estate. I think, therefore, that the revocation has been sustained.

The jurisdiction of the Surrogate to try this question, has been questioned by the counsel of the donee. The Surrogate has jurisdiction to try every question necessary to the settlement of the accounts of the executor. It is competent for the legatees, on the accounting of the executor, to produce evidence to charge him with more assets than he acknowledges in his accounts to have received. They may prove the testator had assets which the executor should have collected, or which he has received and not brought into his accounts. In the present case, the legatees assumed the last position. They sought to charge the executor with the amount of these bonds, and shewed the bonds had belonged to the testator in his life-time, and that the executor had admitted they were in the possession of the testator at the time of his death.. Had the case stopped

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MERCHANT vs. MERCHANT.

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there, it would have been my duty to have charged the executor with the amount of the bonds. But he sets up a gift by the testator; and in order to decide whether he is liable or not for the bonds, the question of gift must be determined. The executor himself raised this point, to exonerate himself from liability; and it is necessary to decide it in order to settle his accounts, and make a final decree for the distribution of the estate. If an executor can retain assets on the plea of a gift *causâ mortis*, and then successfully impeach the Surrogate's jurisdiction to inquire into the validity of this plea, the power of this court in respect to the settlement of accounts and the adjustment of estates is at an end.

I am very clear that this objection is not tenable—and must therefore decree distribution, in accordance with the conclusion to which I have arrived, respecting the revocation of the donation by the testator before his decease.

THOMPSON vs. QUIMBY.

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## THOMPSON vs. QUIMBY.

*In the matter of proving the last will and testament of*  
ABRAHAM G. THOMPSON, deceased.

THE will contained a clause disposing of certain assets according to the terms of a schedule, but was executed without the schedule being annexed,—Held that, whether the schedule was annexed or not, the will was validly executed, having been signed at the *end* of those testamentary provisions which the decedent intended to incorporate in it. Mere speculative belief does not, of itself, afford a clear test of insanity. A will impeached on the ground of incapacity and undue influence, admitted to probate—there being no sufficient evidence of delusion, fraud, or imposition,—the provisions of the will according with the decedent's intentions otherwise expressed,—and the instrument having been prepared with care and deliberation.

The following is a copy of the will propounded.

"I, Abraham G. Thompson, of the city of New-York, merchant, knowing the uncertainty of human life, and that it is allotted unto all men to die, and being desirous of disposing of my worldly estate, do make, publish, and declare this to be my last will and testament—hereby revoking and declaring null and void, all and every will or wills by me previously made.

"First, I direct my executors, hereinafter named, to pay all my debts owing at the time of my decease, and which at the present time are few and inconsiderable; and I desire that my body may be decently interred in the family burying-ground at Islip, Long Island, and that a suitable monument be erected over my grave, similar in appearance and design, and equal in value, to that erected

## THOMPSON vs. QUIMBY.

over the remains of my deceased brother, Jonathan Thompson. And I hereby appropriate out of my estate the sum of one thousand dollars to defray my funeral expenses and the expenses of such monument; and it is my will that the arrangement of my funeral and burial, and the procuring of such monument, shall be under the direction and management of my nephew, Abraham G. Thompson, jun.; and I direct my executors to pay over to him the said sum of one thousand dollars for the defraying of the expenses thereof. But if it shall so happen that such sum of one thousand dollars is insufficient for the purposes aforesaid, my executors may, in their discretion, add thereto such further sum as may be necessary.

*“Second,* I give and bequeath unto each of my nephews and nieces, sons and daughters of my deceased brother, Jonathan Thompson, five hundred dollars: that is, five hundred dollars to each nephew and five hundred dollars to each niece. I also give and bequeath five hundred dollars to my half-sister, Julia Carll. Also, two hundred and fifty dollars to Sarah Howard, daughter of my deceased half-sister, Mary. Also, two hundred and fifty dollars to my nephew, Timothy G. Carll. To Fila Hunt I give and bequeath fifteen hundred dollars; and also five hundred dollars in cash to her daughter, Catherine Knight. I give and bequeath to Daniel T. Cox, the sum of one thousand dollars, upon the express condition, however, that he accepts the same within ninety days after the day of my decease, in full satisfaction of all claims he may have on my estate. Also, I give and bequeath to my friend, William A. Smith, five hundred dollars, and to my young friend, Henry Nash, five hundred dollars. I give and bequeath to my nephew, Abraham G. Thompson, jun. (my namesake), son of my deceased brother, Jonathan Thompson, my gold watch and the gold key given to me by Thomas Richards, to be kept by him in remembrance of me. I also give and bequeath to my nephew, David

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THOMPSON vs. QUIMBY.

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Thompson, son of my brother, Jonathan, the further sum of three thousand dollars. I also give and bequeath to my nephew, Abraham G. Thompson, jun., the further sum of one thousand dollars; and when and so soon as he shall have attended to my funeral and caused the monument to be erected, with a suitable inscription thereon, to the satisfaction of two or more of my executors, I then give and bequeath to the said Abraham G. Thompson, jun., the further sum of two thousand dollars. And if, for any cause, the said Abraham G. Thompson, jun., shall not attend to said funeral and the erection of said monument, I desire that some one of my executors shall attend to the same; and I give to such executor who may take upon himself that duty, the sum of two hundred and fifty dollars, as a compensation for that particular duty. I also give and bequeath to my nephew, George W. Thompson, son of my brother, Jonathan, the further sum of two thousand dollars. I give and bequeath to my grand-daughter, Cornelia, and also to my daughter-in-law, widow of my deceased son, Edward, the sum of one hundred dollars each; and I limit this amount because they have a large property under the will of my deceased son, and because the husband of my said grand-daughter demands from me, as executor, the full legal interest on such property while it has been in my hands as executor, and which interest thus demanded is much more than I have received for the same.

“I give and bequeath unto my executors and trustees, hereinafter named, and to such of them as shall take upon themselves the duty of executing the trusts of this my will, and the survivors and survivor of them, the sum of fifteen thousand dollars, in trust, to receive the income thereof, and to accumulate the same for the use of my grandson, Edward, son of my deceased son, Edward G. Thompson, until he shall arrive at the age of twenty-one years; and thereafter to pay the annual income of said accumulated

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THOMPSON vs. QUIMBY.

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fund to him during his natural life, and at his decease to pay over the principal or remainder thereof to such children or descendants as he may leave him surviving, to be divided among them according to the laws of the State of New York, or to such of them as he may by his last will appoint. But if the said Edward shall die leaving no child or lineal descendant, then it is my will that said fifteen thousand dollars, and the accumulation thereof, shall at his death fall in and become a part of my residuary estate, and be disposed of as hereinafter provided for the disposition of such residuary estate. But my wish is, that my said grandson, Edward, who is now of an age which entitles him to apply for the appointment of a guardian, shall, when he so applies, make application for the appointment as such guardian, I having heretofore been his guardian by his father's appointment, of either David Thompson, George W. Thompson, Francis Griffin, who are named as executors in his father's will and also in this my will, or of William W. Campbell, also one of my executors, or of Joseph Sampson, one of his father's executors, or of Samuel W. Gold, of Connecticut, at whose school the said Edward is now a student.

"It is my earnest wish that Joseph Sampson, who was the partner of my deceased son, Edward, and Francis Griffin, Esq., who was his school-mate and friend, and David Thompson and George W. Thompson, all of whom are named executors in his will, would, after my decease, or at least some one or more of them, qualify as such executors, and take upon themselves the duties thereof; and in that event, I request and direct my executors to pay over to the said executors of my deceased son, or either of them, all moneys hereinbefore given to my executors in trust for my said grandson.

"And in case such executors or executor of my son qualify and agree to act, then I give and bequeath unto them or him, the said sum of fifteen thousand dollars, in

## THOMPSON vs. QUIMBY.

trust, for the benefit of my grandson, Edward, to be held by the said executors or executor of my son, upon the same trusts and conditions as hereinbefore expressed and provided for my own executors.

"I give and devise to my grandson, Edward G. Thompson, all my right, title, and interest as tenant in common with the heirs of my late brother, Jonathan Thompson, in and to the family burying-ground at Islip, Long Island, and the road leading thereto, and the land surrounding said burying-ground, as the same was conveyed to me by my said brother, Jonathan, the same to be held by my said grandson and used as now, as a family burying-ground. And it is my will, that he never sell or dispose of the same, except to his own children or descendants, or to some one or more of the sons of my late brother, Jonathan Thompson.

"I give and devise to each of my executors who, within six months after my decease, may qualify as such executors, the sum of two hundred dollars each, in addition to their legal fees and charges.

"All such household furniture, jewelry, chemical and other apparatus, which is specified or enumerated in a certain schedule accompanying this my will and which is signed by me, I give and dispose of to the respective parties named in said schedule, and in the proportion as therein designated.

"I authorize and direct my executors to sell at public auction or otherwise, the pew which I own in the Brick Church in this city, and which cost me four hundred dollars; and to pay over the proceeds of such sale to the Rev. Dr. Spring, the pastor, to be by him distributed among the poor of the church, in such manner as he may think best.

"All the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath, unto my executors, and trustees hereafter-named, and to such of them as

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THOMPSON vs. QUIMBY.

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shall take upon themselves the execution of the trusts of this my will, and the survivors and survivor of them, in trust, to sell and convey my real estate, and to sell and dispose of my personal estate, except, it is my will that the real estate which I own in Rockland county, shall not be sold by my executors until a certain lease given by me to Henry Sheldon, James Freeland, and William S. Pearson, shall expire or be cancelled. And having converted said real and personal estate into money, then to distribute and divide such residue and remainder of my estate as follows: I direct said residuary estate to be divided into thirty-two equal parts or shares; I give and bequeath six of said parts or shares to the American Bible Society; I give and bequeath five of said parts or shares to the American Tract Society; I give and bequeath five of said parts or shares to the American Seamen's Friend Society, and if the said last-mentioned Society is not incorporated at the time of my decease, I then give and bequeath such five parts or shares to the person who may at that time be the treasurer of the American Seamen's Friend Society, for the use of said Society. I give and bequeath three of such parts or shares to the person who may at the time of my death be the treasurer of the Central American Education Society in the city of New York, for the use of said Society. I give and bequeath four of such parts or shares to the American Colonization Society. I give and bequeath four of such parts or shares to the American Home Missionary Society, or if such Society is not incorporated at the time of my death, then I give and bequeath such four parts or shares to the person who may at the time of my decease be the treasurer of the American Home Missionary Society, for the use of said Society. I give and bequeath to the person who at the time of my death may be the treasurer of the American Board of Commissioners of Foreign Missions, three of such parts or shares, for the use of said society. I give and bequeath one of such parts or shares to the New-

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THOMPSON vs. QUMBY.

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York Institution for the Instruction of the Deaf and Dumb. I give and bequeath one of such parts or shares to the New-York Institution for the Blind.

“If any of the above institutions or societies are not incorporated, then I give and bequeath the parts or shares designated for their use, to the treasurer or other officer for the time being appointed by the respective institutions or societies to receive legacies and gifts; and if there is any mistake made by me in the names of any of the institutions or societies, it is my will that the legacies shall not lapse, but that my executors shall pay the same to the institutions or societies intended and indicated by me. But if for any reason any such legacy should lapse, then it is my will that such legacy or legacies should be divided among the other remaining institutions and societies herein mentioned, in equal proportions; and I give and bequeath the same to said other institutions and societies, share and share alike. It is my will that the parts or shares of my estate given to the American Seamen’s Friend Society, be used and applied in the purchase and distribution among sailors going to sea, of religious books. It is my earnest desire that my grandson Edward and my grand-daughter Cornelia, be made life members or life directors of the various societies and institutions to whom I have above given legacies, when the regulations of such societies and institutions will allow and the legacy is sufficient to warrant the same.

“I authorize my executors and trustees, in their discretion, to refer and submit any matter in difference arising in relation to my estate and affairs, to arbitration, in the usual manner; and also to compromise and compound any debt due or which may become due to my estate, or any matter in difference arising in relation to my affairs or estate, and to extend time for payment according to their discretion; and in all cases to act by attorney, duly authorized and appointed in writing for that purpose, in the execution of the trusts and powers hereby created and conferred.

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THOMPSON vs. QUIMBY.

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"I authorize my said trustees under this will, to invest the trust moneys belonging to each of the trusts hereby created, in bond and mortgage, or in the public stocks of the State of New York, or of the United States, or in the stock of the New-York Life Insurance and Trust Company, or to deposit the same with said Company, and to change such investments, and re-invest the same in their discretion.

"All the powers, authority, and discretion, estates and trusts, hereby given to my executors and trustees, I do hereby give to such of them as shall take upon themselves the execution of this will, and to the major part of them, and to the survivors and survivor of them; and neither of them shall be responsible for the default or misconduct of the other of them, but only for his own wilful misconduct or default.

"And I do hereby nominate, constitute, and appoint my said nephews, David Thompson and George W. Thompson, and my friends, Francis Griffin and William W. Campbell, of the city of New York, and Thomas Baylis, Henry Sheldon, and James Freeland, of the city of Brooklyn, to be the trustees and executors of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal, this twenty-seventh day of October, in the year one thousand eight hundred and fifty-one.

"A. G. THOMPSON." [L. s.]

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J. LAROCQUE and D. LORD, for Executors.

I. The decedent, at the time of making his will, was in as full and perfect capacity as at any time of his life. No change to derangement is shown. See *Mudway vs. Croft*, 3 *Curteis*, 671; 7 *Eng. Com. Law R.*, 549. *Chambers vs. Queen's Proctor*, 2 *Curteis*, 415; 7 *Eng. Com. Law R.*, 163.

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THOMPSON vs. QUIMBY.

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II. The singularities of the decedent were instances of credulity and superstition prevailing from his earliest life, and were not acts of delusion and violations of common sense. Mere credulity and superstition, especially when derived from the traditions of early life, and in relation to subjects not palpable to the senses, do not prove delusion.

III. The singularities of the decedent were limited in range, and never were acted out in relation to his property or his relatives. His business was always prudently and well conducted. His domestic affections were in no degree inverted. His motives for the dispositions of his will are not irrational. See *Dew vs. Clark*, 3 *Add.* 79; 2 *Eng. Com. Law R.*, 436.

IV. There is no evidence to sustain any imputation that the will was affected by his singularities.

V. There is no evidence of undue influence in the procurement of the will.

VI. The will, in its preparation and in its contents, is full proof of his capacity to make it. (*Cartwright vs. Cartwright*, 1 *Phil.*, 90.)

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CLEMENT D. NEWMAN, WM. FULLERTON, and CHAS. O'CONOR, for Contestants.

I. The paper offered for probate is not the will of the decedent. It is in an inchoate state, in the absence of the schedule referred to in the body of the will, and which was to have been signed and attached thereto as a part of the instrument.

The property named in the schedule falls into the residuum of the estate, and goes to the charitable institutions named in the will.

As to this property the will of the testator was defeated.

II. Considering the state of the decedent's mind, he was the subject of an undue influence at the time of the preparation and execution of the will.

## THOMPSON vs. QUIMBY.

The undue influence may not have been sufficient of itself to defeat the will, but it becomes important in this case to consider its nature, tendency, and effects in connection with the decedent's insanity.

III. The decedent was laboring under delusions amounting to insanity, and had not a disposing mind, during the preparation or at the time of the execution of the will. (*Waring vs. Waring*, 10 *Jurist*. *Dow vs. Clark*, 3 *Addams*, 79.)

THE SURROGATE. The probate of the will of the decedent is contested on the grounds of invalid execution, insufficient testamentary capacity, and undue influence.

I. By a clause in the will, the following provision is made: "All such household furniture, jewelry, chemical and other apparatus, which is specified or enumerated in a certain schedule accompanying this my will and which is signed by me, I give and dispose of to the respective parties named in said schedule, and in the proportion as therein designated."

The statute requires the will to be signed by the testator, and attested by the subscribing witnesses *at the end*. It appears that the schedule referred to in the will, was not attached to the instrument at the time of execution, or subsequently. Something was said concerning it when the decedent was about signing the will, and the idea was advanced that it might be annexed afterwards; but the proceeding was not interrupted, and he called on the witnesses to attest, and declared the instrument to be his will, notwithstanding the schedule was not ready. I cannot perceive that it would have made any difference, whether the schedule was attached to the will or not. In either case, unless executed and attested as a will, it could have no testamentary character. Reference may be made in a will to another document, for purposes of description, but there can be no valid testamentary dispositions unless contained in

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THOMPSON vs. QUINBY.

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the will; and the testator cannot in his will reserve the power of giving, or declare that he does give, by an instrument not formally executed according to the provisions of the statute. The schedule it was proposed to attach to the will, as well as the clause in the will referring to it, would consequently have been void, even had the schedule been annexed. The failure of that provision would not, however, have avoided the entire will. The schedule was not designed to be an integral part of the will, but only to be an appendant. All that was intended to be in the will was in it. The instrument itself was complete and perfect, was declared by the decedent to be his last will and testament, and was signed and attested as such at the end. Notwithstanding one of its provisions looked to another instrument and other gifts, that circumstance did not affect the integrity of the will as a complete act then accomplished. The document itself received all the solemnities designed to be performed, and requisite to the due execution of a will; and the appending of a schedule intended to effectuate the objects of one of the clauses, or the failure to append it, could, I think, have no effect upon the question of the due execution of what was at the time signed, declared, and attested as the last will. Independently of this view, there is enough in the evidence to show that the intention in respect to the schedule, so far as it had been proposed to execute it at that time as a supplement to the transaction then consummated, was for the time at least, waived or abandoned. The will was executed without it.

II. I shall, in the next place, proceed to consider the evidence adduced to establish the decedent's insanity.

Born in the county of Suffolk, Mr. Thompson was for some years engaged in business in the town of Islip, and then came to the city of New-York, where he continued to reside for nearly half a century, and died at the age of 75, having amassed a large fortune, amounting nearly to three hundred thousand dollars.

His only son, Edward, died in the year 1835, leaving a

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THOMPSON *vs.* QUIMBY.

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widow and three children, Edward, Augustus, and Cornelia. By his will he constituted his father, the decedent, a trustee of his estate for the benefit of his family. Augustus died under age: Cornelia was married in 1848 to Thomas R. Quimby. She and her brother Edward, who is still a minor, contest their grandfather's will.

The decedent made three wills. By one executed August 31, 1850, Abijah Mann, jun., acting as his counsel, after legacies amounting in the aggregate to \$26,500, to several friends and relatives, he gave \$10,000 in trust for his grand-daughter, Mrs. Quimby, and the residue of his estate in trust for his grandson, Edward—, during life, with remainder to their issue.

On the 13th of May, 1851, by another will, William W. Campbell acting as his counsel, after several legacies to friends and relatives, amounting in the aggregate to ten thousand dollars, he gave five thousand dollars in trust for Mrs. Quimby, twenty thousand dollars in trust for Edward,—during life,—and the residue of his estate in trust for various benevolent and religious institutions.

On the 27th day of October, 1851, two days before his death, he executed the will propounded for probate, by which he left sundry legacies, amounting to \$15,250; gave his grand-daughter, Cornelia, and her mother, \$100 each; his grandson, Edward, \$15,000, in trust during life; and the remainder to religious and charitable institutions.

It is contended that at the time of the execution of this last instrument Mr. Thompson was not of sound mind. The evidence offered to impeach his sanity runs back through a long series of years.

Solomon Davis, employed by him as a coachman and in other capacities, lived with him twenty-two years before his death for about two years, and subsequently at various intervals, from one to four months at a time. He says, "I have lived with him sixteen times, off and on. . . . He was a curious man, and had curious habits. . . . He gave me a book to read, called Francis Barrett;

## THOMPSON vs. QUIMBY.

a book to work spells, cure fever and ague, and raise spirits. He then said he knew a place at Montauk where Kidd's money was buried; that he had been on there with an old man he took up, and had a rod that would attract to the money. That he got a man at Sag-Harbor named David Mulford. He acted as rodsman. It did not work well in the old man's hands, because Mulford had more of the Water of Life in him. I asked him why Mulford had more than other men, whether it was because he was a bigger man, because of his size? He said, No, it was because he drank more rum. He said Mulford took the rod in his hands, and it worked well, and he found where the deposit was, struck a crowbar down on it, and it sounded; formed his ring and commenced digging. Just as he broke the turf, there was a great black and white spotted bull came running over the hill, throwing his tail as if he had the wattles in his back in the spring of the year. The wattles is a kind of fly. The bull pawed and hoofed the dirt, he said, as if he was mad. There were nearly a thousand cattle, he said, that came and passed diagonally over another hill opposite, which acted just like that bull. He said the bull looked to him as big as a mountain. I said, A small mountain, I suppose. He said, Well, it was as big a bull as ever I saw. He said, when the cattle were passing so, Mulford said with an oath, 'By God, we have got it.' Whereupon the cattle all stopped, and went feeding quietly. After that, the crowbar dropped or sunk down into the earth as it stood, nearly a foot. That he, Thompson, told them to let the crowbar stand, till he dug to see what stopped it. Previous to this he said Mulford's speaking broke the spell. He did not say what made Mulford speak. He said he dug till he got to the point of the crowbar, shoving off the earth, and examining and handling it all over to see what stopped the crowbar, before Mulford spoke; and he found a little piece of mother-of-pearl fan (which he showed to me), at the point of the

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THOMPSON *vs.* QUIMBY.

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crowbar in the earth. This was pretty much the whole of that story; he has repeated it to me at various times; and that was what made me think he was a curious man.

"He said at another time that he had been back to the same place, Fort Pond Bay, at Montauk point, with old Mr. Brower. Brower made a needle. Sullivan Moulton went along also. That same Brower took along an old bull-b...h, as he expressed himself. They carried down a pail of water to drink, from the house. They centered the spot where the treasure was, again, began operations, and the old b...h went and lapped in the water; Moulton stepped up and gave her a kick, and said, 'Get away, you cursed b...h;' and that broke the spell at that time; they could do no more. He said, in the account he gave me of the first visit, that no one was to speak during the operation. He told me a great many such things; I would sit here a week, if I were to repeat all of them. I lived with him about two years in Beekman street. It is about twenty-one years ago last April, I think, when he moved to William street. I was living with him when he moved. . . . We had moved about half the furniture out of the Beekman-street house. He told me to go to the stable, and get a wrench to take his plate off the door. I came in the back way through the basement, up the back stairs into the hall, and met him about half way; and he took the wrench out of my hands to unscrew the plate. I turned, and had just got down the stairs a bit, when I heard him screech out as if something had hurt him. I ran to his assistance; and he was lying partly on the floor, the wrench in one hand, and holding himself up with the other. He said, when he began to unscrew the plate, some very strong thing hugged him—it must have been a ghost—it gave him a squeeze like a bear. I took him down, led him down to the William-street house; and he said the Beekman-street house was haunted, and he would never go into it again for all New York. . . . . He

## THOMPSON VS. QUIMBY.

sent me once up to Leyden,—it is something like twelve years ago,—to buy a pair of horses for him. I bought a pair in Lowville,—blood bays. . . I brought the horses home, and put them in the stable. As I sat in the stable, holding up my foot, which I had hurt, he came into the stable, talking to himself. He did not see me. Said he, ‘There are the very same horses Mrs. Hunt dreamed about,—little ears, stick right out sharp,—almost as red as blood,—and the jaws go as quick as a pair of tailor’s shears,—head up high,—rainbow necks, natural tails, long manes. No,’ said he, ‘I will never ride after them.’ Then I spoke, and said, ‘Why, Mr. Thompson?’ He started back, and said, ‘What! you there, Solomon?’ I said, ‘Yes.’ He asked me if I was well. I replied yes, and asked him how he was. He answered, all very well, but his head hurt him—putting his hand to his head; his heart was right, and his body was right, but his head hurt. He had the head-ache. Then I asked him why he would not ride after the horses, and talked with him a good while before he would tell me. Finally he said he had seen an old horse over at Mr. Post’s that would answer his purpose better than young ones. Finally he said, after some argument and persuasion, ‘Mrs. Hunt has dreamed a dream since you have been gone. ‘You know, Solomon—(he always called me Solomon)—that when Mrs. Hunt dreams, she dreams right.’ I said, ‘Mr. Thompson, anybody will dream right, when they dream awake.’ The old gentleman was quite angry with me. He said, ‘She dreamed that just such horses as those you brought home,—she described them exactly—she dreamed that you hitched them before my little pocket-book carriage. You drove. I got in behind. You ran down one of the North-River streets, hove me out, killed me, tore me all to pieces, and the blood was all over the street.’ He swapped the horses away with Post, and took an old horse for this span, and gave fifty dollars to boot. The horse was not worth ten

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THOMPSON vs. QUIMBY.

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dollars, for a gentleman. I gave \$180 for the team, and it cost me \$50 to get them here. They were worth \$400 in New York. He never rode after them. He sold them to Post the same day of the conversation I had with him in the stable." . . . . "He said he had the receipt and all the ingredients to make [the philosopher's stone], except one,—that was the water of life. He must line a room with white Irish linen to get that,—and must get a man in there, and keep him drunk six months on strong beer, or London porter, which was better; at the end of that six months ... .. would be the water of life, and he could complete the philosopher's stone; and with that he could know what every person was about, in the earth, under the earth, and in heaven. He said this a great many times. The last time he said it was about nine years ago. He said the philosopher's stone would enable him to do anything he wanted to do; to see all the treasures of the earth; to go to Heaven, and see what they were doing there; and come back again to the earth, and see all that was doing here, and all the mines and treasures hid in the earth. He said he had once fixed a room with Irish linen, and put Dr. C. in it to talk with the spirits, to get the ingredients for the philosopher's stone; and he got the receipt, but not the ingredients, from Dr. C. He said he had forty wax candles to burn in the room while the operator was at work. It cost a good deal. He never told me where the room was. I don't know that he had a room fixed up anywhere. . . . He told me J. D.'s girls could see treasures in the earth, by looking in glasses. . . . He said some had stones they could see in. He had a stone he could see in. He could see landscapes at a distance; that when he got his philosopher's stone completed, he should not want any of them, because he could then see more distinctly. I drove him to D.'s a good many times. The girls looked in glasses for him, trying to see treasures in the earth—minerals and mines. I heard him say to them, he

## THOMPSON vs. QUIMBY.

wanted them to look in the glasses to see if they saw a deposit of money on Red-Hook. They said they saw it. He said he would go some time and get it. This was as much as 18 or 19 years ago. He never said he had any books to raise spirits, except the book, 'Francis Barrett.' He said he could raise spirits and lay them with that book, and cure all kinds of diseases with receipts and charms in that book." The witness also stated that Mr. Thompson had a mineral rod; buried a purse of gold at Red-Hook, and it was found by a man who used the rod, twice out of three times. He sent Davis to Philadelphia for a man named J. R., to come to New York and make him a mineral needle. The needle was to be "one-third pure silver, one-third bismuth, and one-third white copper," and "was to attract gold and silver hid under the ground." Mr. Thompson paid \$50 for the receipt for making it, and attempted to make a needle in his laboratory. He kept Davis rubbing a "magnet he had made" three hours every day; and this was to be continued 25 days before it would be of any use. This was about eight years before his decease. He said he had been to Providence to consult a clairvoyant, and that she described his house and its arrangements with perfect truth. He consulted a clairvoyant in this city, and said she told him where the Kidd treasure was. He pretended to show Davis spirits in the moon and sky; said "they were spirits of the air,—some lived in the moon, and some in the sky." "He would point and say, 'There, don't you see them?' and I would say, I did not know but I saw them, to get rid of him the easiest way I could."

Mrs. Mather became acquainted with the decedent about nine years before his decease, and was in the habit of seeing him quite frequently. She invented the submarine telescope, and he called upon her to examine it. The acquaintance, commenced in this way, continued until the spring prior to his death. At the first interview, he

## THOMPSON vs. QUIMBY.

stated that he wished to see if her telescope could be used to find Kidd's money. He subsequently discoursed with her in respect to treasures, clairvoyants, glass-lookers, enchantment, spirits, mineral rods, needles, and the philosopher's stone,—said that he had a house set apart and a man consecrated for the purpose of procuring the philosopher's stone, and described the method, substantially as stated by Solomon Davis, with some additions and variations. He claimed to command the planetary spirits, and described their influence over particular days. "He said the philosopher's stone would cure all diseases, prolong life to any age, transmute metals into gold; when teeth had been lost through old age, a little of it put into the gums would bring out new teeth. With it he could see into futurity or anywhere else. . . . That by means of it he could see anything in heaven or under the earth." . . . "He told how some mineral rods were made; he said he could hold them in his hands, and they would answer questions, bowing towards him to say Yes; they would attract to any hidden treasure under the earth." He described the method of making them, which consisted in mixing certain metals and herbs at particular hours and days, putting them into a hollow bone or quill, and placing them in the Bible, "at some particular chapter, where they lay a certain time, and then they were ready for use; but at the same time more or less enchantment would get upon them." The last time but one the witness saw him, "he said that he wanted to get a glass to lay over the eyes of some person, about the time the breath left the body, who was born under the same planet he was, and then he could see anything he desired. It must lie on the eyes of the corpse several days; and then the spirit of the deceased person would be so concentrated in the glass, that he could see anything he desired in the spiritual or material world." . . . "In the summer, . . . after he had been sick, he told me that because he had burst the bonds of human

## THOMPSON vs. QUIDBY.

nature and explored the spiritual world, that the spirits tormented him when he was sick, were all around him, and were paying him off for what he had done; they would come upon him when they were not called for, and would alarm him. He could see them better when his eyes were shut than when they were open. He said every body had three eyes, one spiritual and two temporal. The spiritual eye lay between the other two over the nose." He told the witness that he consulted clairvoyants on business affairs, wore charms and talismans; and that he would live nearly a thousand years. The last time she saw him at the top of the hill in Columbia street, Brooklyn, he said he would live to see it levelled.

I have stated the evidence of these two witnesses with particularity, for the purpose of comparison with the other testimony in the case.

Dr. Kuypers, his attending physician, states, that he mentioned to him that he had discovered the curative effects of sulphur in rheumatism. During his last illness he spoke about mineral rods and Kidd's treasures, the cure of fever and ague by wearing a piece of paper with certain words written on it; and told him the story about digging for Kidd's money, and the appearance of the bull; but he never conversed with him in respect to raising spirits, seeing spirits in the moon, having been attacked by a ghost, wearing talismans, or knowing any means by which he could protract life to a very great age.

Kinney, who was his coachman for about two months in the fall of 1849, states that when he asked him for some black lead for the harness, Mr. Thompson inquired how he would know whether it was good, saying, "If you put it in your mouth, and chew it, and eat it, you would then know whether it was good or not." . . . . He adds, "He told me one day, he had a whistle—he made me in dread on that day—that he had a whistle; and anything he

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THOMPSON vs. QUIMBY.

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wanted he would get it, when he whistled with that whistle."

To Dr. Gold, the preceptor of his grandson, Edward, he communicated his specific for the rheumatism.

To Mr. McAllister, who mesmerized him for pain in the head, he stated that he derived great benefit from it. He also showed him one of his mineral needles, which he said would point to silver.

Mr. Mann, his counsel, states that he was aware of his peculiarities in relation to supernatural agencies and influences, clairvoyance, hazel-rods, and Mesmerism; that Mr. Thompson often spoke with him on these subjects; stated that he knew the contents of the Kidd ship just as well as if he had counted it; that he had searched for Kidd's money on Gardiner's Island. "He discovered," says Mr. Mann, "that I had no faith; saying, Mesmerism don't exist without faith." He experimented with the hazel-rod in Mr. Mann's presence; and, the experiment not being satisfactory to that gentleman, he was displeased with him.

Mr. Rodman, the partner of Mr. Mann, says he was aware of the decedent's belief in supernatural agencies; but the only instance he specified was a cure for fever and ague, which consisted in wearing about the neck a paper, with three words upon it—one in Greek, another in Hebrew, and another "in a language he could not tell."

To Mr. Pentz, President of the Mechanic's Banking Association, he occasionally talked on the subject of Kidd's money, gold-digging, and instruments to point out mineral deposits.

Mr. Joseph Strong—heard him converse a number of times about Kidd's money.

Mr. Smith, who occupied an office adjacent to that of Mr. Thompson, states that he had a glass in which he requested the witness to look, saying, he "would see, first, a very small, brilliant white light, which would gradually

## THOMPSON vs. QUIMBY.

enlarge; and then he would be able to see whatever he desired." He also exhibited his divining rod.

With Mr. Suydam, he talked in respect to Kidd's money—Mesmerism—double-sight.

He conversed with Judge Campbell in regard to clairvoyance, animal magnetism, and Kidd's vessel, divining rods, glasses for second sight; and he told him the story of digging for money at the time "he saw the devil in the shape of a large bull."

On the other hand, Mr. Whitehead, his accountant for two years; Mr. McBride, the guardian of his grandson Edward; Mr. Cox, who attended to his business for eight years, and stayed in the same house with him over nine months just before his death; Mr. Thorne, who, for several years, had met him on business two or three times a week; Mr. Whitney, an old acquaintance, and in the habit of frequently meeting him; and the Rev. Dr. Spring, his pastor for over forty years, have all been examined; and none of them, with a single exception to which I shall hereafter advert, testify to any indication of superstitious belief.

After examining the evidence for the purpose of ascertaining the frequency of his conversations on subjects connected with his peculiar views, and bearing in mind the period of time over which the testimony runs, and the degree of intimacy between the parties, I cannot perceive that he indulged in communicating his opinions on those topics more freely than is the case with men of sound mind in respect to more rational speculations; nor do his views appear to have obtained such dominant sway as to have overcome the usual proprieties of social intercourse. His eccentricity was under control, whether we regard the skepticism or the impressibility of his subjects, or the degree of familiar and confidential relation in which they stood. His counsel laughed at him about the Kidd affair, and "he seemed ever after to avoid the subject." To his pastor, the Rev. Dr. Spring, he betrayed none of his absurd notions;

## THOMPSON vs. QUIMBY.

and if he ever sincerely believed in all the follies stated by Solomon Davis and Mrs. Mather in respect to the philosopher's stone and spirits, no trace of it, beyond what I have stated, is to be found in the evidence of his most intimate friends. In many respects, therefore, the statements made by Mrs. Mather and Solomon Davis stand isolated. They, consequently, deserve more scrutiny.

I observe that some of the most ridiculous and extravagant absurdities attested by them, are expressed in a jargon peculiar to works on natural magic and astrology. The witness Davis testifies that Mr. Thompson referred to a book by "Francis Barrett," and said "it spoke of divining rods," and "that he could raise spirits and lay them, by that book, and cure all kinds of diseases with receipts and charms in that book." Mrs. Mather, after a long statement of the same kind of nonsense, also testifies, "*he said he got this from Francis Barrett's book, entitled, 'Natural and Ceremonial Magic.'*" It is quite apparent, therefore, that many of the most extravagant and superstitious follies detailed by these two witnesses, were not only not the product of Mr. Thompson's own mind, but he retailed them second-hand, not professing to be their originator.

It is not unworthy of observation in this connection, that Davis read in Francis Barrett's book, and Mrs. Mather's husband procured a copy from Europe, and she "looked into it enough to see what it was." Mrs. Mather thinks Mr. Thompson told her the place where he performed his experiments was the house in Columbia street, Brooklyn; and that he said he "had a house set apart, and a man consecrated for this work." Now, about this very time, Davis testifies that he lived in that house, with his wife, some few months; and he never pretends that any experiments were performed there. He had the range of the whole house except one room in the attic, which was locked; and he saw Mr. Thompson go in that apartment once. Mr. McBride says Mr. Thompson was in the habit

## THOMPSON vs. QUIMBY.

of visiting that house every day ; but there is nothing very singular in that circumstance, as his daughter-in-law resided in the house adjoining, and Mr. Thompson visited her daily, entering her house through the door which communicated with both dwellings. There were four lots and a garden, and Mr. Thompson occasionally attended to the garden. Marshall, his coachman, says he saw linen sheetings in the parlor closet ; but he also states that Mr. Kellogg, the uncle of the contestants, slept in an attic bedroom, which was furnished—that the testator's grandson slept in the adjacent room ; that he had been in all the other apartments, and there appeared to be nothing the decedent wished to conceal from him. Mr. Kellogg was not produced as a witness. Mr. McBride, who resided next door for a number of years, Davis, and Marshall, all fail to show anything unusual or mysterious connected with this dwelling. Nor was it entirely unoccupied. That he did not let it, or put it to a more profitable use, depended possibly upon his expectation of residing there. Davis states expressly that he said, “ he had built that house for his own use, to live and die there, and nobody should ever live in that house till he lived in it. He said the reason why he did not live there himself, was because Mrs. Hunt would not go there to live with him.” Mr. McBride also says that when he applied to rent it, he answered that he kept it for his own use. I think, then, that the evidence entirely fails to show that the decedent used this house for the purposes stated by Mrs. Mather. The contrary would rather appear. Why, then, did he so state to her ? This may be answered in two ways. After nine years she may easily be mistaken, as to whether he asserted he *had* done, or *could* do, certain things. Much of his conversation, as related by these witnesses is expressive of his belief, and not of his actual practice ; viz. that to accomplish a certain end, “ you *must* ” do so and so—that such a thing “ *would* ” happen, or “ *could* ” be done.

If, however, it be taken as certain that he told Mrs. Mather the Brooklyn house was set apart and used for these experiments, then the fact that it was not so used, tends to impeach the sincerity and meaning of the whole of his conversation with her. Was he indulging in idle talk, on a subject congenial to his tastes; or was he earnest in everything he said? If he misstated a fact, how much easier to overstate a belief! The same motive would tend alike to each result.

Experience establishes that some persons are fond of relating the marvellous, either for the purpose of terrifying the listener, or exciting wonder, or from a desire, not at all uncommon, to be thought strange and eccentric. We should not too hastily conclude, because Mr. Thompson chose to frighten his coachman by telling him he could obtain anything he wished by blowing a whistle; or because he told Mrs. Mather that he expected to live a thousand years by means of the philosopher's stone, that he really believed himself to be in the possession of these powers. And even in regard to his intimate friends, the expression of his views on topics of this character is to be viewed with reference to a human failing sometimes exhibited—the affectation of believing in strange and wonderful things, not ordinarily received by the mass of mankind. Rather than not be noted, some men choose to be marked for their singularity. Such singularities, it is true, are generally founded upon some predisposition in the character; and it is only the extravagant exhibition and expression that is affected. After making every reasonable allowance, however, I have no doubt Mr. Thompson's mind was impressed with a sincere belief in many absurd notions. There seems sufficient evidence to show that he believed in Mesmerism, clairvoyance, divining and mineral rods, dreams, and spiritual influences. He searched for the supposed deposits of money by Kidd, and ascribed his failure in two instances to the utterance of certain words by the

operator. That he said he saw the devil in the shape of a bull, appears also to be well established. He believed likewise in the efficacy of cures for rheumatism and fever and ague, as before stated.

III. If we apply the present state of knowledge and intelligence to the opinions entertained by the decedent, they appear irrational and absurd. What the human mind admits in one stage of its progress, is rejected in another. While many dreams in the dawn of modern philosophy, which a century or two ago were thought rational, are now regarded as follies,—the discoveries and inventions which have been the fruit of modern science might very well have been esteemed, had they been predicted at that period, as idle fancies compared with the claims of alchemy and astrology. Little more than a century ago, the distinguished German, Stahl, whose investigations mark a new epoch in the science of chemistry, did not disdain to treat of the philosopher's stone, of the transmutation of metals, and of the universal medicine. Lord Bacon, judging that "the world has been much abused by the opinion of making gold," said, that if one should "take a thorough view of the works of the alchemists or followers of natural magic, he might perhaps be at a difficulty which he should withhold, his tears or his laughter;" yet says, "the work I judge possible;" and proceeds to direct an experiment for the maturation of metals. Porta, the eminent Neapolitan, the inventor of the camera obscura, three hundred years ago, described the method of finding treasures in the earth by means of the witch-hazel *Corylus*. The story of Ponce de Leon, the Spanish adventurer, is familiar to the student of American history. He expected to find a river in Florida by bathing in which his youth would be renewed. This story spread so that, says Herrera, "There was not a river or brook, nor scarce a lake or puddle in all Florida but what they bathed themselves in." The age which could reject the Copernican system on the ap-

parent contradiction of it by the evidence of the senses, put faith in the absurdities of alchemy and astrology, and in the reality of witchcraft. The British Parliament recognized the existence of witchcraft by formal legal enactments, in the reigns of Henry VII., Elizabeth, and James I. Sir Matthew Hale sat in judgment on the trial of witches; and less than 150 years ago, a woman and her young child were hanged for selling their souls to the devil.

Commenting upon Plato, and referring to various indications of the belief in the supernatural, a modern author of great learning observes, in respect to the ancient belief in ghosts and apparitions, that if ever there was a doctrine of which it could be said that it was held *semper, ubique, et ab omnibus*, this is one.

What, then, are we to say? that ideas which have existed in all ages of the world are proofs of mental disease, of a mind organically deranged? that credulity, superstition, and belief in the supernatural, are indications, *per se*, of insanity?

IV. The difficulty of defining insanity consists in the selection of a strict and proper test. The wide distance between a sound intellect and the diseased mind of the raving maniac, renders it easy to distinguish the extremes of the mental condition; but as we approach the doubtful frontier which separates madness in its various forms and shades from sanity, it becomes a nice and delicate work to draw the line between mere eccentricity, the excitement, over-action, or undue development of particular faculties, and that general or partial derangement of the intellect which arises from positive disease of the brain. The germs of fancies and antipathies, of certain habits of thought and feeling, are often sown in youth, and, instead of being corrected as years advance, develop into the most obstinate prejudice, extravagant ideas, and the widest departures from the common sense of mankind. Such aberrations are generally the result of ignorance,

and of early impressions formed in the nursery, or by the fireside, when authority and tradition are the sources of knowledge and faith, and when the moral and intellectual character is permanently moulded. To confound the results of such causes with the phenomena of mania, would erect a standard of sanity dependent on education and knowledge. The history of our race shows that intellectual culture cannot invariably be relied upon to dispel the mists of superstition. The works of the brightest lights of ancient philosophy teem with the absurdest notions on such subjects. And even at the present day, when the Christian religion, and science, have dissipated multitudes of errors, the human mind has found new fields for the indulgence of the love of the marvellous. The forms of speculative error are numerous; and if they are *indicia* of an unsound mind, who shall be the judge, when masses of men are arrayed against each other? The danger of entering into the field of speculative belief for the purpose of finding *criteria* of mental alienation, is manifest in the difficulty of agreeing as to the standard of truth. Reason, faith, and sensual perception have each their independent action. If nothing be known but what can be proved by the senses, the range of knowledge will be confined to narrow limits. If nothing be believed unless susceptible of explanation, faith is restrained in its noblest exercise. It is equally obvious that if we adopt correct reasoning as a standard of healthy action, there will be as many different conclusions as to what constitutes correct reasoning upon any given topic, as there are various opinions among mankind. Dr. Copeland describes a certain class of theomaniacs, as "characterized by an enthusiastic belief in divine selection and acceptance, and in the future eternal damnation of all who do not think as to religious matters exactly as they do; by a belief of having received revelations from the Almighty, or of being inspired, or of holding communications with the Holy Spirit, or with angels

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THOMPSON vs. QUIMBY.

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or saints; or by a belief of having received a mission from heaven to convert sinful men." He notes the religious excitement furnished by "revivals," camp meetings, and field-preaching, as instances of this kind of partial insanity. Dr. Lee, commenting upon this position, justly observes: "If holding the above doctrines be considered a valid test of the existence or non-existence of insanity, we fear that the number would not be small in our country who would fall under the appellation. But that a reception of the doctrines of Calvin, stern as they unquestionably are, should subject an individual to the title of insane, will hardly be conceded in a country where in some places a large majority of the inhabitants are believers in this creed. The followers of Swedenborg, now considerably numerous, who believe in holding communications with angels and saints, would also, according to our author, deserve the same appellation; not to include some of our ablest clergy, who claim to have received a divine commission to convert sinful men." Dr. Lee concludes his remarks, however, by characterising Mormonism as a decided form of monomania.

The danger of this kind of reasoning lies in regarding as indications of radical disease, mental phenomena existing in all ages and among all classes, and dependent on natural faculties and propensities, or arising from adventitious circumstances of early impressions and education.

Being of opinion that mere speculative belief does not of itself afford a clear test of insanity, I do not esteem the peculiar opinions entertained by the decedent sufficient to establish mental derangement. This, however, is only a conclusion in the abstract, and without reference to the particular circumstances of his case. It becomes necessary to examine some special facts bearing upon the question of his capacity.

V. 1. It often happens that men entertaining absurd

ideas not in themselves indicative of insanity, evince signs of a disordered intellect in the irrational indulgence of their eccentricities to a degree destructive of the balance of the mental powers. The will seems no longer free, the predominant idea sways the mind, subverts the judgment, rules the entire conduct, and produces absurd, extravagant and foolish actions. In cases of unusual theoretic belief, it is important to inquire whether the belief has obtained the mastery of the mind, or whether it has been held in subordination to the judgment. In this connection let us, therefore, examine, as a matter of fact, how far the decedent indulged in these peculiar ideas at any pecuniary sacrifice.

Davis says that the horses about which Mrs. Hunt dreamed were exchanged at a small price, though worth four hundred dollars. He does not state how he knows the amount Mr. Thompson received; and as there was no reason growing out of the dream, why Mr. Thompson should sell the horses for less than their market value, I am inclined to receive his evidence with suspicion.

Mr. Thompson *told* McAllister, the Mesmeriser, that he had *offered* \$1,000 for a mineral needle he showed him. With that exception, if it be one, there is no instance of any considerable amount of money expended in the line of these pursuits, save seven hundred dollars in the Kidd affair, for which he alleged he had some security. This is all the evidence there is of any improvident expenditure; and instead of evincing the excessive predominance of a single idea, or the supremacy of his peculiar views over the faculties of his mind, to the subversion of the ordinary rules of prudence and practical common sense, we must acknowledge that he seems to have kept his singular tastes under reasonable control.

2. The origin of the opinions of the decedent which have been made the subject of criticism, is pertinent to the question of a sound mind. If they broke out suddenly, or at an advanced stage of life, suspicion might be excited; if

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THOMPSON vs. QUIMBY.

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we can trace them to early education, and find there a cause, they are not to be imputed to a deranged understanding.

There prevailed, many years since, no small excitement respecting supposed deposits of treasure made by freebooters in the olden times; and in reading the decedent's description of his youthful exploits in money digging, we are reminded of the legend of Wolfert Webber, rendered classic by the elegant pen of Irving. Mr. Thompson spent the first thirty years of his life in the county of Suffolk, where such beliefs prevailed. "Among the ignorant and superstitious," says Mr. Strong, his townsman and schoolmate, "there was a superstition as to Captain Kidd's money. A great many people believed it was buried there, and that it will be found some time or other. It did not exist generally among intelligent people. On an old place there were perhaps fifty holes dug in search of Kidd's treasure. They call it Money Hollow." Judge Campbell places the date of the decedent's digging for Kidd's deposits, "fifty years ago, or more," "when he was a young man." Mr. Mann says, "He lectured me repeatedly on the history of the Kidd expedition, the connection of the Livingstons with it, the cannon which he had recovered, and which lay by his door; and the cradle-blanket, worked in gold, which had been given to his grandmother on Gardiner's Island, by Kidd or some of the officers. He said he had advanced little or no money in searching for the treasure, except some small loans to individuals. He told me he was born at the east end of Long Island, on Gardiner's Island I believe; that he had lived there in his youth, and had searched for the Kidd money off there."

The impressions of childhood are never effaced, and the seeds of superstitious belief then implanted, are seldom thoroughly eradicated. The familiar story of Martin Luther casting an inkstand at the devil in his cell at

Erfurt, illustrates the difficulty of throwing off entirely the influence of early education. The strongest minds often fail in the effort.

The state of education in that part of the country where the decedent passed his youth and early manhood, during the last quarter of the last century, could not have been of a very high character. With a disposition to believe in the marvellous impressed upon his mind, the pursuits of some of the natural sciences to which his tastes inclined him, readily led to speculations in alchemy and other studies that "sway the imagination more than the reason." He formed a laboratory, and acquired a "more than ordinary acquaintance with practical mechanics and chemistry." Persons of his understanding and training, are prone to magnify the influences of magnetism and electricity; and the pretences of Mesmerism and clairvoyance, the operation of charms and of divining rods, may be received under the specious form of science. In tracing the course of such follies, we can readily distinguish them from those phenomena which mark insanity.

3. At the time of the execution of the will, the decedent, says Dr. Kuypers, "placed his finger on the seal, and said, This is my last will and testament and seal; am I a deranged man, Doctor?" The Doctor also states that during the last month of his life, Mr. Thompson remarked, he supposed there were people who might deem him deranged; and that he smiled when he said so, as if in ridicule. I see nothing in this circumstance bearing against his sanity, though it is indicative of a supposition that his sanity might be questioned. Whether he so supposed, from an internal consciousness of deranged intellect,—or from conjecture that his eccentricities, coupled with the nature of his disease, might expose him to such a charge,—or because intimations had reached him from others,—may be the subject of speculation, and is not determined by the character of the remark itself. The physician having been

## THOMPSON vs. QUIMBY.

consulted as to his case at the time of the execution of the will of August, 1850, he may have intended his inquiry, at the time of making the last will, as an appeal to medical testimony in the presence of the witnesses called to attest the transaction.

4. Dr. Kuypers states that three or four days before the decedent's seventy-fifth birthday, which fell on the Sunday preceding his death, Mr. Thompson told him he expected to die on that day; "that none of his ancestors had ever attained over seventy-five years, with the exception of one, who had gone one day over seventy-five; and that, he anticipated, would be the result with him. . . . He was led to that impression at a very early period of his life." I remark upon this circumstance, that the existence of such a presentiment, based on his family history, forms no test of insanity. Though his argument were bad,—though he had expressed a mere foreboding, without offering a reason,—the presentiment itself does not prove a deranged intellect. Experience and the history of the human mind, show that mankind are liable to indulge in such impressions, even without an apparent cause.

5. The disease to which the decedent was subject during the last year of his life, was one which ordinarily tends to impair the functions of the brain. . . But the impression it makes on the intellectual faculties is gradual, and depends upon the frequency and violence of the attacks. Of 339 epileptics mentioned by Esquirol, in the *Salpêtrière*, nearly one-third had no aberration of the understanding; and this institution receives chiefly old and severe cases. (*Esquirol on Insanity*, p. 149.) Dr. Cheyne states that he has known epileptics preserve their intellects to a very old age; and Dr. Lee mentions the case of a "scientific gentleman of extraordinary talents and acquirements," who was subject to the disease for twenty years, without any perceptible failure of the mental faculties. Mental aberration does not generally appear until after

several or many attacks, and in the course of prolonged cases. The first appearance is in an intermittent form after the seizures. The most to be inferred, then, from the nature of the disease with which Mr. Thompson was afflicted, is, that he was the subject of a malady which, though not always associated with insanity, generally tends in progress of time to enfeeble and impair the powers of the mind. This should induce the greatest circumspection and care in the examination of his case.

6. The state of Mr. Thompson's physical health, and the progress of his disease, were by no means such as to cause great bodily prostration.

In the fall of 1849, he met with an accident, as he was leading a horse down the gangway to his stable. The animal fell upon him, struck him on the temple with his shoe, and the blood gushed out of his mouth, nose, and ears. He recovered shortly, but after the injury complained a great deal of his head. He had two attacks of disease, one just previous to the execution of the will drawn by Mr. Mann, in August, 1850, and the other in December following. The former was partial paralysis, arising, in the opinion of his physician, from congestion of the liver; the latter was epilepsy. The epileptic convulsions were sudden, violent, and were usually protracted, so that he would recover partially in about two hours, and in two days, entirely. After recovering from the illness of August, 1850, he attended to his usual avocations, and was not confined to his house. The epileptic convulsions occurred at intervals of about a month, and he had none for over ten days before his decease. On one occasion he was seized with an attack while attending a meeting of the board of directors of the Mechanics' Banking Association. During the last six months of his life, he was mostly confined to his house; but in April, 1851, he attended a meeting of the board of the Equitable Insurance Company; in June or July, Mr. Thorne transacted

## THOMPSON vs. QUIMBY.

business with him at his office in Wall street; about that time, he rode once or twice to the residence of his daughter-in-law at Brooklyn; and three weeks before his death, the doctor accompanied him in his carriage to his office. During all this period he does not appear to have been confined to his bed. Dr. Gold describes his physical health as improved, ten days before his death; and at the time the will was executed, he rose from his chair and walked to the bed, where he signed it. The day of his death, Mr. Rodman found him sitting in an arm-chair, and on the occasion of his last attack he was led to the sofa and laid there.

7. Apart from the grounds upon which his general sanity is assailed, there is little if any cause for suspecting that his faculties were seriously impaired by age or disease. The most specific allegation on this point relates to his memory.

Dr. Gold and Mr. Mann both concur in saying that he stated the accident, when he was injured by the horse, to have occurred at Brooklyn, instead of New York. He was at Brooklyn when he told Dr. Gold, and pointed out an inclined plane leading to his stable there, "and, as I understood it," says the doctor, "the very place he had been hurt. It is possible he might have intended to show me that place, as similar to the one where he had been hurt; but if so, that was not as I understood it." Mr. Mann says, in respect to the same occurrence, "he told me it was at Brooklyn, repeatedly." Mr. Cox says it happened at the stable in William street, New York, but he was not present at the time. The only person who was present, was Kinney, the coachman. It may be inferred from his testimony, that the accident happened in New York, but he does not say so distinctly.

Mr. Mann states that the decedent became garrulous, and repeated the same circumstance several times, in the course of the same conversation. This is very com-

## THOMPSON vs. QUIMBY.

mon with persons advanced in life, and of itself is not an indication of failure of memory in essentials. Mr. Mann thinks that in the last interview he had with the decedent, on the 4th of October, 1851, when they were conversing about the trust accounts, and it was stated that the same rule of law in respect to interest which applied to the share of Cornelia would apply to that of Edward, Mr. Thompson replied, "I don't care about that, for Edward will have what is left, if there is anything left." If this implied that he had left the residue to Edward, or intended to do so, it is inconsistent with the will of May, 1851, and the will of October, 1851. It is opposed to the clearest evidences of a contrary intention, long entertained and persisted in. It must be remembered, however, that at the time of this interview, Mr. Thompson had never disclosed to Mr. Mann the contents of the will of May, nor the proposed contents of the will then under consideration, although on that very occasion he said he wished his advice in respect to its provisions.

When the will of August, 1850, was executed under the auspices of Mr. Mann, the testator did not expect to survive. That instrument was prepared in haste. He yielded on several points to the suggestions of Mr. Mann, but stated that if he should recover, he would "materially alter it," and make a "better will." During Mr. Mann's absence he destroyed it, and made another, the provisions of which he never communicated to him "in the slightest respect," and which, says Mr. Mann, "it was delicate to ask." In relation to the will of August, 1850, he stated to Judge Campbell, "a will had been made for him during his previous illness, and that when he had recovered he had destroyed it; that it was not the will he intended to make." Mr. Mann was under the impression from his conversations with the decedent, that he had executed the will of May, 1851, during Mr. Mann's absence at the South. But Mr. Mann returned from the South early in April, and the will was executed on the 13th of May, over a month after Mr. Mann's return. Mr. Mann often

## THOMPSON vs. QUIMBY.

remonstrated with him in respect to his feelings toward his grand-daughter ; and Mr. Thompson " disliked the advice," and " was sometimes a little impatient " with him. In view of all these facts, it is evident that while Mr. Mann, in October, 1851, reasoned on the hypothesis that Edward was to take the residue as proposed in the will of 1850, Mr. Thompson reasoned on the provisions of the will of 1851, which gave Edward \$20,000. This may have been the reason why he said, as to Edward, that he would have what is left, "*if there is anything left.*" If we suppose he meant to imply that Edward would have the whole residue, the expression " if there is anything left," is senseless, or absurd ; for an estate of a quarter million of dollars could not be swept away by a comparatively small claim. But if we suppose that he was arguing on the hypothesis that he had set aside a certain sum, say \$25,000 for these grandchildren, and that after deducting the amount to be paid Mrs. Quimby for interest, Edward was to have what was left, and therefore, as to him it made no difference whether the same rate of interest applied to his share, the remark is not altogether unmeaning. This view explains also the reduction of the bequest to Edward from \$20,000, in the previous will, to \$15,000 in the last will. It shows also, why he was dissatisfied at these claims for interest, and notwithstanding Mr. Mann's repeated suggestions that it made no difference—which, as Mr. Mann understood the will, was true—he immediately reverted to his complaints ; for, as he knew the provisions of the will, and his design to give a certain sum to the grandchildren, the increase of the claim for interest diminished the legacies, and made proportionately a matter of right, what he had designed as a gift.

8. Mr. Cox states that when Mrs. Quimby resided at Portland, she sent a present to Mr. Thompson of a pair of socks. He told the witness " he was not going to wear them." He said, " there was a woman who had a hus-

## THOMPSON vs. QUIMBY.

band who did not treat her well, and she made him a shirt, magnetized it, put it on him, and squeezed the wind out of him. He was afraid these socks might serve him in that way—might injure him.” “Mrs. Quimby sent him a present of some strawberries in 1851. I saw them on the mantelpiece with a note. I asked Mr. Thompson if he was going to eat them. He said No, he was afraid there might be poison in them, and wished me to take them to Mrs. Thompson with the note.” “The strawberries were taken over to Mrs. Thompson in a wagon. Mr. Thompson and I went together. The socks I carried to Mrs. Thompson myself.”

Such circumstances as these often indicate mental delusion ; but if, in the face of the fact that these articles were sent by him to a person with whom he was on friendly terms, we conclude that the decedent was in earnest, then it is observable that he only expressed fear of the possibility and not belief of a fact.

VI. I pass to the general observation and opinion of the witnesses who were adduced to sustain the allegations against the soundness of the decedent's mind.

Dr. Gold saw him on the 18th of October, 1851, and details some conduct indicative, in his opinion, of imbecility ; but without considering how far the facts he mentioned justified this conclusion, I find from Mr. Cuthbert's testimony, that he visited Mr. Thompson that very day for the purpose of leeching him. It is probable, therefore, that when Dr. Gold saw the decedent, an epileptic fit was impending. At such times his mind was undoubtedly affected. I lay no stress, then, on any indications of imbecility Mr. Thompson may have exhibited at that interview. For the same reason, the evidence of Mr. Cuthbert, who was called in to deplete him when laboring under attacks of his disease, affords no means of judging as to his intellect at periods of comparative health.

Mr. Cox, who stayed in the same house with the de-

## THOMPSON vs. QUIMBY.

cedent for the ten months preceding the last two weeks of his life, says nothing in respect to his capacity, except that he attended to business at intervals, and "sometimes would do it very well, and sometimes not so well. Sometimes his tongue would be a little thick, and he could not explain himself so well. In making a bargain, he was pretty keen up to the time I left."

Abijah Mann, jun., acted as Mr. Thompson's counsel for about seven years immediately prior to his death, was on terms of intimacy, and had frequent business intercourse with him. He prepared the will of August 1850. During the summer of 1851, he saw the decedent repeatedly in respect to the settlement of the trust of his son's estate; and on the 3d or 4th of October, was requested by him to delay an intended journey to the South, in order to advise concerning proposed alterations of the will of May, 1851. Mr. Mann expresses the opinion, that for three years the state of his memory was not such as to enable him to bear in mind the state of his family relations, and his duties towards the members of his family, in respect to disposition by will. He did not think he would have comprehended without suggestion and advice, the state of his family relations and duties in regard to a disposition by will; but with suggestion and advice he thought he could. I understand him to say that in his judgment Mr. Thompson was "of sound mind, and capable of disposing of his property," but "not without suggestion and advice," and that his memory was not "always to be relied upon in these respects, without friendly aid and advice," without which he might make a very indiscreet will.

He expresses the opinion that "he had been growing weaker from the time of his confinement, in body and mind;" his temper was more irritable; his memory was weak, and had been for several years previous; he was very garrulous, and would repeat the same story, and the same event two or three times over in the same conversation;

## THOMPSON vs. QUIMBY.

he was easily affected to tears. Sometimes there was something peculiar in his laugh.

After his first sickness in 1850, he says his mental faculties were impaired to some extent; "his memory was not as good, his temper was more irascible; but his faculties for business transactions seemed to me to be as good as they ever were at any period that I knew him, and for aught that I could discover when I drew the will (August, 1850), and when it was executed, he was just as competent to make a will and dispose of his property, as he was at any period while I knew him, so far as I could perceive; and I took particular pains to satisfy myself in that respect." At the last interview he had with him, Mr. Mann states, "I thought him as competent as he had been, saving the physical debility under which he was laboring, and the more irritable state of his mind and temper." Mr. Mann also says, "his mental faculties were weaker," which he explains elsewhere by attributing it "to the prostration of his physical system." He explains what he means by Mr. Thompson's not being able to bear in mind the state of his family relations: "I mean his collateral relatives." He adds, "I don't think Mr. Thompson could have made a will at any period after I knew him, leaving his property to others than his grandchildren, and forgetting that he was cutting them off." In respect to his peculiar opinions, he says, "I should regard him when he was in good health, in all business matters, as a man of sound mind. In all matters of theoretic speculation in regard to supernatural agencies, Kidd's treasure, the history of Kidd's piracy, and the like, I should regard him as a man of unsound mind. I think he had a monomania on all those subjects."

VII. If we adopt the opinion of Mr. Mann, the most important witness for the contestants, that the decedent *was* mentally competent to make a will in October, 1851, with suggestion and advice, then of course he had testamentary capacity. There being testamentary capacity, the

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THOMPSON vs. QUIDBY.

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law does not regard its quality or degree, except so far as to see, in cases of low degree, that the testator enjoyed the free use of such capacity as he possessed.

It is urged that the decedent was unduly influenced in making the testamentary dispositions of his estate, by his housekeeper, Mrs. Hunt. Three witnesses speak to this point. Two of them were coachmen, who had been discharged several times at the instigation of Mrs. Hunt; one of them thrice, on his own confession, for being intoxicated, and the other at least twice, because he disagreed with her. The latter says, that in April, 1851, he refused to live in the same house with her, notwithstanding Mr. Thompson, according to his story, offered to send for a lawyer, have his will made, and leave him all his property, on condition he would return to his service. The third witness, Mr. Cox, just before the decedent's death, had a difference with him arising out of a claim of \$4,000, for services, and was discharged. The will gives him \$1,000, on condition he accepts it in ninety days in full satisfaction. Receiving the evidence of these witnesses, however, as unbiased, while it shows dislike on the part of Mrs. Hunt, it indicates no very *active* hostility towards the daughter-in-law and grandchildren. There is a great deal stated as to what Mrs. Hunt said to the first two witnesses; but very little, if any, reliance is to be placed upon conversation of that kind among domestics. If she had boasted much more than she did as to her conversations with Mr. Thompson, her unsworn statement would be no proof of any other fact than her boasting. Mr. Cox says that he heard Mrs. Hunt say to Mr. Thompson, when he was talking about the children, "The reason she did not like them was that they did not take any care of him, and all they wanted was his money." This is the only instance of any expression made by her in Mr. Thompson's presence in disparagement of the children. Mr. Cox stayed in the house ten months during the last year of the

## THOMPSON vs. QUIMBY.

decédent's life. While he was there, the will of May, 1851, was executed, and the last will, of October, 1851, was under consideration. Davis and Marshall lived with the decedent for many years. They were all inmates of the house, and possessed the most ample opportunities for observation. And yet, with the exception of the solitary instance I have specified, there is no proof of a word said to Mr. Thompson against his grandchildren, or an effort made to influence him against them in any manner.

Mrs. Hunt had been his housekeeper over twenty years; and her attentions had probably become so necessary to his comfort, that he was unwilling to part with her. She seems to have been of a prying, inquisitive disposition; and the proof indicates that Mr. Thompson resisted this, and was more inclined to keep his affairs to himself, than to gratify her curiosity. She was unfavorably disposed towards his daughter-in-law, and probably to the children; but that did not prevent Mr. Thompson's visiting the former at Brooklyn every day of his life, when in a fit state of health; nor did it, to all appearance, alienate his affections from Edward, down to the day of his death. Though greatly displeased at his grand-daughter, in consequence of her marriage against his wishes, and determined to leave her little, if anything, he continued to treat her with apparent kindness. If the housekeeper, then, ever seriously attempted to injure these members of his family in the estimation of Mr. Thompson, there is no proof that she succeeded. If it be urged that the exertion of undue influence is to be presumed from the provisions of the will, that involves the question whether no other motives can be found inducing such a disposition of his property. Testamentary dispositions otherwise inexplicable might be referred to some secret cause; and we might thus argue backwards from the will to the supposed malign influence that effectuated it. But we are not to presume base motives and bad actions, in the face of actual proof,

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THOMPSON vs. QUINBY.

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as to the reasons the decedent assigned for the grounds of his conduct,—unless indeed the reasons so assigned were mere pretexts without foundation in fact, or so irrational as to be unworthy of credit. How that was, I shall consider hereafter; meanwhile, I shall close this branch of the case by remarking that whatever may have been Mrs. Hunt's influence over the decedent, if exerted, it was not very successfully exercised in her own favor. By his first will, he gave her \$2,000; her daughter, \$1,000; and directed the surrender of a note, for \$1,500, he held against her son-in-law. By the second will, he reduced the legacies to her and her daughter, one half each; and by the last will, he increased her legacy to \$1,500, left her daughter's as it was before, but made no disposition of the note of her son-in-law. Independently, then, of the note, the gifts to her and her family, from first to last, were reduced from \$3,000 to \$2,000.

VIII. I have thus reviewed at length the several grounds urged against the capacity of the decedent, and the validity of this will. In judging of their weight, it is necessary to bear in mind that the law has adopted a very low degree of mental capacity as the standard. Idiots and lunatics are disabled from disposing of their property by will; but every person of lawful age, not embraced in these classes, is competent to make a will; and in passing upon the validity of the act, courts will not, in the absence of fraud and undue influence, measure the extent of his understanding. Mere imbecility will not avoid a will or deed. The law "does not deny to a man of very feeble mind the right to make contracts, and manage his own affairs." "If he be not wholly deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property; and his will stands as a reason for his acts." (*Stewart vs. Lispenard*, 26 Wend., 255; *Blanchard vs. Nestle*, 3 Denio, 37; *Osterhout vs. Shoemaker*, *ibid.*, note; *Clarke vs. Sawyer*, 2 Comstock, 498.)

## THOMPSON vs. QUIMBY.

It is very manifest, then, that in testamentary cases the question is not whether the testator has made a will conformable to the views of his friends, or family. Provided he be not wholly deprived of reason, however intellectually feeble he may be, he has a right to dispose of his own property to please himself. In the absence of fraud or circumvention, so long as he is not an idiot or a lunatic, he will not be denied this right.

This doctrine is well settled. It is the rule of the statute, and of the common law, and has been sustained by our courts in the most emphatic manner.

Was the decedent an idiot or a lunatic? The witnesses for the contestants do not allege this, though certain circumstances are appealed to as *indicia* of partial unsoundness; and it is somewhat remarkable that not one of them says the decedent was incompetent to manage and dispose of his property, down to the day of his death.

IX. Turning now to the evidence in support of his testable capacity, we find the favorable testimony of associates and friends, spreading itself over the entire life of the decedent.

1. Frederick Pentz, the President of the Mechanics' Banking Association, was personally acquainted with the decedent for fourteen years. Mr. Thompson was a director of that institution, attended the meetings of the Board regularly, and took an active part in the management of the Bank. Mr. Pentz describes the decedent as "a clear-minded man in his business," and "very firm when he came to a decision," and of "strong mind."

Richard I. Thorne, the President of the Equitable Insurance Company, knew the decedent since 1819, and intimately for ten years preceding his decease. Mr. Thompson was a Director of the Company for twenty-six years, to the time of his death, and for a long period Chairman of the Finance and Loss Committee, till two years before he died. He was very regular in his attendance at the meetings of

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THOMPSON vs. QUIMBY.

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the Board. Mr. Thorne characterises him as a man of "sound mind," "very shrewd in business, very correct in all his dealings and perfectly conscientious," "very quick in coming to a decision" and "very firm after having arrived at it."

Joseph Strong, Secretary of the Equitable Insurance Company, knew the decedent over sixty years. When they were boys they went to school together. They were in the habit of meeting daily at the office of the Insurance Company. He says, "So far as regards his money concerns, I considered him perfectly competent to manage them. In money matters he was considered rather a shrewd man. I believe he was a very decided man. When he formed a decision, I believe he was not very easily moved from it."

Mr. Smith, the decedent's broker, was acquainted with him for eight years, and their offices communicated. He transacted business for Mr. Thompson, and saw him daily. He says, he was "perfectly competent to manage his own affairs," "remarkably cautious about his expenditures and investments, all his stock investments being judicious and profitable, particularly so those made during his last sickness."

Lambert Suydam, President of the Union Mutual Insurance Company, knew the decedent for twenty-five or thirty years. He was Director with him in the Equitable Insurance Company many years. He says, "I thought he was perfectly sound in mind, and capable of transacting business." . . . "He was a shrewd man, and considered a money-making man. I think he had decision of character."

Stephen Whitney knew the decedent probably ever since he was in business in New-York, and was a Director with him in the New Jersey Railroad Company. They met very frequently. He says, "I never saw anything

## THOMPSON vs. QUIMBY.

to make me think but that he was perfectly sound in mind and capable of transacting any business."

The Rev. Mr. Spencer knew Mr. Thompson for seven or eight years before his death. He says, "I supposed him quite competent for the management of any financial matters or property he might have."

The Rev. Dr. Spring was the decedent's pastor forty-one years, and states that he was a regular attendant at church. In respect to the truths of Christianity, Dr. Spring says, "Few men who make no profession of religion understood them better. He took pride in defending them, . . . and by his own uniform method of reasoning—the deductions from the principles of nature to the great principles of revealed truth—for which his mind was particularly qualified." . . . "His views of God and revealed truth were clear, strong, and decided. He was of a philosophic turn of mind,—fond of reasoning in his own way, and tracing things to their causes, their relations and influences."

Mr. Whitehead knew the decedent for about two years, and visited him almost daily for a long time. He says, "I always conceived that he was a very good business man, fully able to manage his own affairs. He was not very easily moved when he had once made up his mind. He was rather positive than otherwise."

Dr. Kuypers knew the decedent for twenty years, and during that period frequently visited him in a professional capacity. He was the attending physician during his last illness. The doctor says, "I have at no time regarded him as insane." . . . "He would frequently make the remark, that there were persons who might suppose him to be deranged." . . . "I never supposed so myself. That led me to investigate his case, to see if I could discover anything of the kind, but I never observed that he was deranged."

Mr. Rodman, the partner of Mr. Mann his counsel,

knew the decedent from 1844. He says, "I suppose he was as capable of attending to his own business as any other man for whom I had done business. He was very accurate and particular in his business, so far as I observed him—very critical about his money matters."

Judge Campbell knew the decedent for upwards of fifteen years intimately, and seldom passed a week without seeing him. He says, "I always considered him a very shrewd, intelligent man, of strong mind and a strong will. He conversed with me a great deal on matters of science and new discoveries. That is, he conversed a great deal and I listened to him. He was a curious man, there is no doubt of that. He was a man very fond of talking, not only about scientific discoveries, but about curious and speculative matters."

2. It readily occurs to inquire, to how recent a period the observation of these witnesses extended; whether their intercourse was not limited during the last year of Mr. Thompson's life. I have carefully examined the evidence, to ascertain this accurately, and also to learn whether any failure of his mental powers was discovered.

Mr. Pentz visited him during his sickness, once in two or three weeks, and conversed with him on business. He says his mind was strong.

Mr. Thorne adjusted an account of premiums with him in June or July, 1851, and says he "discovered no difference as to his mind latterly."

Mr. Whitney called to see him three or four times in the course of the summer, while he was sick, and saw him a few weeks before his death. They conversed on business and general topics, and he "discovered no change in the activity or strength of his mind."

The Rev. Mr. Spencer visited Mr. Thompson twice during his illness, in the summer. The interviews were perhaps an hour long, and the conversation was on religious subjects. He "discovered no deterioration in his

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THOMPSON *vs.* QUIMBY.

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mental faculties," "no peculiar failing," "no failure of memory," but thought his mind "as strong and vigorous as before."

Mr. Strong had frequent interviews with the decedent on the subject of the accounts of his son's estate. He saw him about a week before his death. He mentions Mr. Thompson's "perfect recollection" of some circumstance that had occurred twenty years ago, and says, "I discovered no difference in Mr. Thompson's capacity at any time. I used to wonder that his having those fits or turns did not impair his mind. I thought his mind good as it ever was."

Mr. Suydam visited him twice during his sickness,—the last time two or three weeks before his death. He says, "He stated that he had it in contemplation to dispose of some of his stocks, but did not know what other use to make of his money. We compared views in relation to financial and money matters, as we had been in the habit of doing for many years before. He spoke so intelligently on these subjects, that I had no suspicion there was any doubt as to his mind." "I never discovered any deterioration in his faculties. I don't think I did in the least." "At our last interview, I discovered no difference in the strength or activity of his mental faculties, from what they had been for twenty years past."

The Rev. Dr. Spring, the decedent's pastor, called on him during his last illness, nearly once a week; and the Saturday before he died, had an interview with him, not far from an hour long. He says, "At the last interview his mind was clear. He felt the force of every truth, and understood it." He "had peculiarities of intellect, but he never exhibited any wandering in his mind. His mind was clear to the last. He reasoned, but he always reasoned in the same way, and nearly in the same words. He was a rationalist, and reasoned from analogies. He reasoned intelligently at our last interview." "He was agitated and excited to a considerable extent on the subject of religion,

## THOMPSON vs. QUIMBY.

for the last two or three months of his life. He was interested on that subject for the last year of his life. Indeed, I never conversed with him on that subject but he wept. By agitation and excitement, I mean solicitude and reasonable interest. There was no frenzied excitement at all. His mind was as well balanced when talking with me on the subject of religion, as it was when talking on the subject of stocks. He showed no debility of mind. I think there was nothing like childishness. I think, twenty years ago, if he was equally sick, he would have spoken very much in the same way as he did at our last interview. What he said was very characteristic of him. He was a man of sane mind. I presume his mind was to some extent sympathizing with the debility of his body."

Mr. Smith frequently saw the decedent at his house, when he was confined. He says, "He was affected, I always thought, by his fall some two or three years ago, for some time after. But during his confinement to the house,—the last four months, or the last year of his life,—I had a good many transactions with him, and I thought his mind was clearer than it had been previously."

Mr. Isaacs, the accountant, who received instructions from the decedent about a week before his death, relative to the method of making up the accounts of his son's estate, says, "The conversation lasted about half an hour. I had no difficulty in understanding him. He complained of his head. As far as his conversation went with me, it was perfectly rational, and such as a person acquainted with accounts would use in giving directions. He was very precise as to the mode in which they should be made up."

Mr. Whitehead kept the decedent's books, and was in the habit of calling at the house daily. He says, "I never had the least doubt of his being perfectly sound in mind until the day of his death." "I do not recollect ever observing any confusion in his ideas, or inability to talk connectedly on any subject." In the morning of the day

## THOMPSON vs. QUIMBY.

he died, he called the attention of the witness to a notice, in the newspaper, of the decision of a suit in which he was interested, and requested him to send for Mr. Mann or Mr. Rodman, his counsel, to see him on the subject.

Mr. Rodman called in pursuance of this message, and remained in conversation with the decedent two or three hours. Towards the close of the interview, Mr. Thompson was seized with the attack that terminated his life; and yet, though Mr. Rodman found some difficulty in explaining to him "the exact effect of the decision on the demurrer," he gave Mr. Rodman a history of the transaction out of which the suit arose; had his papers brought, and made explanations, which his counsel took down in writing. Mr. Rodman says, "He undertook to state to me the position he occupied in that suit, and the extent of his interest in the subject-matter of the controversy,—and also the interest of the other parties,—and he did so intelligently."

Judge Campbell, who drew his will, and had repeated interviews with him, says, "I have no doubt but that he was a man of sane mind. I mean to extend that, to the whole period of my acquaintance with him."

Dr. Kuypers, his physician, says, "The condition of his mind, memory, and understanding, at the time he executed his will, was perfectly sound, I should judge." "I do not think the mind of the decedent had become weakened by his disease." "I regarded his mind as sound as could be." The day before his death, he requested the doctor to attend an exhibition of a "magnetic battery" that evening, and report to him the next day. The ensuing morning, when the doctor called, he took from his pocket a notice of the exhibition, cut from a newspaper. He adds, "He talked intelligently—strictly so on that subject. He told me he had failed in obtaining a certain power, which he thought this man had effected." Dr. Kuypers also states explicitly, that he thought Mr. Thompson fully as competent when he

## THOMPSON vs. QUIMBY.

signed the last will, as when he executed the will of August, 1850.

X. Independently of all opinions, however, there are numerous facts which bear with great force upon the state and condition of his mental powers.

1. Up to the spring or summer of 1850 he attended entirely to his own business, and made his original entries in his books regularly and intelligibly. The transactions were to large amounts and related to the collection of dividends, lending of moneys, and investments. He then engaged a book-keeper, to whom he furnished the data for making the entries. He attended himself to his collections and out-door business, until he was confined to his house, and after that, received moneys and transacted other business at home, keeping the direction of his affairs under his own control and supervision. His transactions in stocks and loans often ranged from twenty to forty thousand dollars at a time. During his sickness he made large investments in railroad bonds and stocks, through the medium and with the advice of his broker, who says, "I do not know of any injudicious investment during the last two or three years of his life." The precise statements to Mr Rodman, the very day of his death, concerning the bonds of the Long Island Railroad Company and the suit in regard to them, satisfy me, after inspecting the memorandum in writing taken by Mr. Rodman at the time, that his memory was vigorous. A proof to this point is recorded in the will itself, where we find a casual suggestion of Dr. Spring, that if he intended to remember the seamen's cause, it would be well to make some provision for good books to take to sea, incorporated into a direction to that effect.

The preponderance of evidence, then, is decisive in favor of the conclusion that whatever may have been the general condition of his mind through life, he did not manifest towards its close any increased symptoms of ec-

## THOMPSON vs. QUIMBY.

centricity, or any material failure of mental faculty. The strange opinions which form the basis of impeaching his sanity were as marked twenty years ago, when he conversed with his coachman about natural magic, as they were in later years; or, in justice, I should rather say they were more positively displayed, for during his last sickness they were by no means prominently exhibited.

2. If, then, he was a lunatic through life, his history is very extraordinary.

On settling in New York he engaged in the auction business, and acquired a fortune. He claimed that he had suggested the idea of the auction law, and also of the law which provided and regulated the finances of the Erie Canal.

His son Edward, on his decease, made him trustee of his estate for the benefit of his widow and children. He was allowed to enter upon that trust without objection from the other executors, or from the widow. He managed it with fidelity and prudence. He was permitted to retain the management of his own large estate, and it is conceded that no one was more able to preserve and increase it. He made large investments during his last illness, with profitable results. He was, at various times, president of the Union Bank; trustee of the Seamen's Friend Society; director of the Farmers' Loan and Trust Company, and a member of its Finance Committee; director of the Mechanics' Banking Association,—of the Long Island Railroad Company,—the New Jersey Railroad Company,—the Equitable Insurance Company, and chairman of its Finance and Law Committee,—and of the Union Insurance Company, being one of the incorporators named in its charter granted in 1849. To the time of his death, he still continued director of several of these institutions. He took an active part in their management, and was regular in his attendance at the meetings of the boards.

And yet it is urged that this man was of unsound mind,

## THOMPSON vs. QUIMBY.

and incapable in law of declaring what disposition should be made after his death of the property he had earned, preserved, accumulated, invested, and controlled during life with prudence and sagacity.

XI. It is often useful in cases of this kind to inquire into the circumstances attending the execution of the will, and the extrinsic proof, if there be any, of the reasons given for the particular testamentary dispositions. As to the legacies in the several clauses of the will to his sister, nephews, nieces, and others, there is no manner of question that they accorded with his intention deliberately formed and persisted in for over a year, though the amounts were varied somewhat in the three wills.

There can be no doubt, I think, that the decedent's original intention was to leave his estate to his grandchildren. Davis states that he promised his son Edward, on his death-bed, that he would leave all his property to his children. He stated to Mr. Mann, his counsel, that he had promised his son "to act the part of a father to his children while he lived, and they should be his heirs and inherit his property." This, doubtless, continued to be his intention until the marriage of his grand-daughter. He was very much dissatisfied with that event, threatened to cut her off, and "asserted his entire independence to make his will as he pleased." Though he never spoke to Mr. Mann of bequeathing his estate to religious institutions, he said, when expressing displeasure at the marriage of his grand-daughter, "that he could do anything of that kind if he chose." On the 31st of August, 1850, he made his will. At that time he stated to Mr. Mann, his counsel, that he never had made any other will before this; though previously he had repeatedly told him that he had made a will, which he had destroyed when his grand-daughter got married. He proposed by the will of August, 1850, to give his grand-daughter five thousand dollars; but at Mr. Mann's suggestion he enlarged the sum to ten thousand dollars,

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THOMPSON vs. QUIMBY.

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which was placed in trust. The general residue of his estate was given in trust for his grandson, although in January, 1849, he had stated that he did not wish a trust made for Edward. About the time he executed the will of August, 1850, he said to Mr. Mann, that "if he got better, he would materially alter it . . . would make a better will, or something like that."

Between August, 1850, and May, 1851, when he executed the second will, some time in the winter, he sent for Mr. McBride, the guardian of Edward, to call at his office, and "spoke of Edward now being aware of having a large estate, and hoped it would not spoil him, and felt pretty sure it would not, from his being under the tuition of Dr. Gold, a man who would instil proper principles into his mind."

On the 13th of May, 1851, he executed the second will. In that instrument he returned to his original intention, from which Mr. Mann had diverted him, and reduced the legacy to his grand-daughter to five thousand dollars. He placed the sum of twenty thousand dollars in trust for Edward. The general residue of his estate was given to the American Bible Society, the American Seamen's Friend Society, the American Colonization Society, the American Tract Society, the American Education Society, the American Board of Commissioners for Foreign Missions, and the New York Female Assistance Society.

The great change from the will of August, 1850, consisted in reducing his grandson's interest to the sum of twenty thousand dollars, and leaving the general residue to charitable purposes. As this feature of the will of May, 1850, was not substantially departed from in the last will of October, 1851, I think the bearing of events that transpired between May and October, has been somewhat mistaken by the contestants. These events may be looked to as indicative of motives inducing alterations of the will made in May; but the bequest to religious institutions

## THOMPSON vs. QUIMBY.

remained untouched in its general scope. The intention in that respect was not originated at the time of executing the last will—but was only persisted in.

The main alterations made by the will of October, consisted in taking away the bequest to Mrs. Quimby, and reducing the legacy to Edward, from twenty to fifteen thousand dollars. During the summer of 1851, Mr. Quimby made application to Mr. Thompson for a statement of his wife's interest in the estate of her deceased father. He was referred to Mr. Mann, as Mr. Thompson's counsel; and in August he communicated with him on the subject, suggesting that it would be proper for an executor's account to be rendered to the Surrogate. The accounts were made up at various rates of interest, as Mr. Thompson had invested the funds. He was advised by his counsel that the accounts were made up improperly, and the court would probably charge him at the rate of seven per cent. semi-annually. Mr. Mann states that he complained of the injustice of this, was greatly excited and exasperated, and that he blamed Mr. Quimby "for requiring it." The counsel for the contestants urge that Mr. Thompson was under a delusion in this respect, and that, in fact, Mr. Quimby had not insisted on any particular rate of interest. But it is answered that the accounts were under consideration a long time, and it is not clear that we have in evidence all that has passed in regard to them. It does appear, however, that Mr. Quimby called for a regular account to be filed with the Surrogate. It was not unreasonable for Mr. Thompson to regard that as a demand for a *legal* account; and on being advised that a legal account was an account at the rate of seven per cent., it was not unnatural to consider Mr. Quimby as requiring seven per cent. If this idea that Mr. Quimby required seven per cent. was a purely insane delusion, it is a wonder Mr. Mann did not contradict it, instead of palliating the matter by saying it would make no difference. In any event, there can be no doubt that the fact of having

## THOMPSON vs. QUINBY.

to pay a larger sum than he expected, led to the alteration of his will. He had, by the will of May, given his grandchildren certain sums, in view of the property they would be entitled to in their own right—and now, when he discovered their estates would be larger than he had anticipated, and the increase would come out of his own estate, he might, without vindictiveness, think it right to reduce their legacies. Mr. Whitehead states that about a month before his death, Mr. Thompson informed him a new will was in course of preparation—that the claim presented for interest was the principal cause “of making the alterations—of making the new will.” “The idea conveyed was that the claim for interest would necessarily lessen the amount to be left to the parties by legacy; that having left the parties a certain amount, what they might claim from him in the way of interest, or extra interest as he considered it, would lead him to lessen their legacies.” The increased amount of the estates of his grandchildren, then, seems sufficiently to explain the reduction of the legacies he had left them in the previous will of May, 1851.

Why the decedent, by the will of May, left no more than \$5,000 to one and 20,000 to the other, is another question. To ascertain the motives, we must look to facts that transpired before, and not after the execution of that will.

To the time of the marriage of his grand-daughter, the decedent contemplated leaving his estate to his grandchildren. He always expressed great dissatisfaction with her marriage without his consent. There can be no doubt that, as to her, his testamentary intentions were changed at that time. Nothing can be clearer than his uniform determination, she should thereafter have but a small portion of his estate. Up to that period, he had kept the funds of his son's estate mixed with his own. A few days before his death he stated to Mr. Isaacs, the accountant, that in the accounts of his son's estate, he had not been particular as to interest, “as he then considered his son's property mixed

## THOMPSON vs. QUIMBY.

with his own—and that he considered it as of no consequence—that all his property would go to them—meaning his own as well—but his grand-daughter had been stolen from him.” . “He said he had intended the whole property for his grandchildren—that his grand-daughter had been stolen from him, and he wished the accounts made up giving them every allowance.”

His grand-daughter was married in 1848. He at that time began to speak of a will, and threatened to cut her off. Shortly after, in January, 1849, he consulted with Mr. Mann in respect to a will; and in August, 1850, he executed an instrument by which, after the remonstrances of his counsel, he gave her no more than ten thousand dollars. Soon after this he was anxious to have the trust accounts of his son's estate settled, and prepared himself to pay over the funds, having \$125,000 deposited in bank for that purpose. This circumstance showed that he no longer considered his son's estate as mixed up with his own, and was desirous of separating the two. It is in harmony, also, with the different dispositions he proposed to make of his own property. The entire current of his actions and conversation in respect to this marriage, after effect it had on his testamentary intentions, is consistent and uniform. The little he ever intended she should have out of his estate, after the occurrence of the marriage, and on yielding to persuasion to enlarge it—and then of his own will returning to the original amount—he finally took entirely away, when he found that at full rates of interest her portion of her father's estate exceeded, principal and interest, by some fifteen thousand dollars, what he had originally contemplated.

But it is argued that his displeasure with his grand-daughter was no reason for being displeased with his grandson. That is true; and yet the exhibition of what he may have esteemed ingratitude on her part, would naturally lead to reflections never before suggested, on the

## THOMPSON vs. QUIMBY.

subject of testamentary provisions. Mr. McBride, the guardian of Edward, states that from the time he became intimate with him, for ten years, he spoke of his grandson in connection with his large estate. "He first endeavored, or said that he endeavored, to keep secret from him that he had so large an estate from his father as well as from himself, for the reason that he wished him to get his education before he knew what he was worth. On one occasion, after the death of his grandson Augustus, he said that circumstance would only augment the large amount Edward and Cornelia would have; which, if they used it well, would make them very rich,—if they used it badly, would make them very miserable." And again, "That it was enough to spoil them, or to that effect . . . that he thought it might be disadvantageous to young people if they knew they were to have a great deal of property." The Rev. Dr. Spring, at one of his interviews with Mr. Thompson, spoke of his grandson Edward; and the decedent said, "I intend to give him a good education, and to leave him fifteen thousand dollars. . . That . . . with the property his father has left him, when he comes of age, will be enough for him—more will ruin him." Judge Campbell, who prepared the will of May, 1851, suggested to him that he did not propose to make a large provision for his grandchildren. The judge states, "In relation to Edward, he said then, as he said several times, that he would have a large property under his father's will; that he himself had commenced life with but small means; and if Edward took great care of his property, he would have abundance—as much as a young man ought to have. If he should squander his own, he did not mean he should have his property to squander also; that his wish was to make a provision for him, which should be in trust,—as he would have his own property under his father's will at his control when he came of age,—so that in case he spent his own, he should not come to want."

## THOMPSON vs. QUIMBY.

Again, Dr. Knyppers states that he frequently heard Mr. Thompson say he "intended to give money for religious institutions . . . months before his death." . . . "He used to say, 'When I die, I will assist the poor, and do all the good I can, and give my money for religious purposes—religious institutions.'" The Rev. Mr. Spencer testifies that in July, 1851, he adverted to the fact that he had bequeathed "something to the societies in his will," naming several of them. The Rev. Dr. Spring testified that the decedent alluded to that subject at two interviews—the last, on the Saturday preceding his death. Judge Campbell states that Mr. Thompson directed the disposition of the residue of his estate by the will of May, 1851, in favor of these institutions, of his own motion, and without any suggestion on the part of the judge. The names of most of these societies were taken from a lease of property on the Hudson River, dated November 14, 1850, for digging for Kidd's vessel, which Mr. Thompson believed was sunk at that place—the profits of which had been reserved for several of these institutions.

In respect to these bequests to religious institutions, it was insisted, on the argument, that the decedent during life had given little, if anything, in charity. That is no reason why he should not give by his last will. When a man is compelled to leave all his wealth behind him, there is no longer a controversy between the love of possession and the duties of benevolence. He has to *select* the objects of his bounty, death leaving him no choice except as to that. It is difficult to speculate as to the motives operating in making that selection. One whose avarice had struggled successfully against charitable impulses, might, for that very reason, give more liberally, in compunction for past neglect. The idea of buying his spiritual peace with money has been attributed to the decedent, but I think unjustly. His views in favor of these institutions was not formed at the time of his last conversation with Dr. Spring.

They had been entertained for some time, had been incorporated in the will made May 1851, and were not the result of religious excitement during the period his last will was being prepared. Mr. Thompson had been a constant attendant at Dr. Spring's church forty years, twice a day. This evinced settled interest and respect, in regard to religion. The wonder in his case is, that he had not given more freely during life, rather than that he was liberal in postmortuary bounty.

Assuming that he had determined, as he distinctly avowed, to leave nothing to his grand-daughter and only a limited sum to his grandson, and recollecting that the latter was unmarried and the former had married against his will, his testamentary dispositions do not seem irrational. Edward's estate, under his father's will, on his arrival at age, will exceed \$64,000,—on his mother's decease will be increased by \$33,000; and adding \$15,000 in trust for him, under the decedent's will, his fortune will amount to over \$112,000.

XII. The preceding deductions and conclusions may thus be stated.

1. The facts do not establish insanity. They exhibit credulity and superstitious belief, but no delusion in respect to facts and occurrences which had no existence, except in the imagination. An eminent English judge, of great experience, has declared that he never knew a case of insanity where there was not delusion present.

2. There was no other symptom of insanity—no false perception of external objects—no mania, raving, wildness, violence, or incoherence. The memory was sound, and the faculty of attention perfect. In business and in social relations, his conduct was proper and becoming.

3. His eccentricities were under control. Self-government was not impaired, nor the balance of the mental powers disturbed.

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THOMPSON vs. QUIMBY.

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4. Upon ordinary topics, he conversed with propriety, and argued with good sense.

5. His capacity for business was excellent, and he took an active part in the management of various important trusts and offices.

6. His peculiar views were not the offspring of a diseased imagination. They may be traced to early education and to reading. They did not originate with him, but were derived from tradition and from books.

7. These singular opinions were not exhibited suddenly towards the close of life, and when attacked by disease, but existed for many years, probably from a very early period, and when his mind was in full vigor.

8. No effort was made during his lifetime to dispossess him of the control and management of his property.

9. The large estate which he had earned and accumulated, was carefully preserved and prudently invested. He was not wasteful nor extravagant.

10. The general observation and opinion of his friends and associates were in favor of his sanity.

11. His faculties were not materially impaired during his last sickness.

12. His testamentary intentions were not suddenly formed, or hastily carried out. At least six months before his decease, and probably much longer, he had determined to leave the bulk of his estate to charitable uses. Two wills, one executed in May and the other in October, contain the formal statement of this design.

13. These wills were prepared with care and deliberation, and after very frequent consultation with his legal adviser.

14. The numerous memoranda relating to the testamentary provisions, show a self-originating power, and will, and rational action.

15. There is no evidence of influence exerted to affect his intentions.

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THOMPSON vs. QUIMBY.

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16. There is no proof even of suggestion, except in two unimportant particulars not affecting the general scope of the will. He himself dictated all its main provisions.

17. The instrument comports with his intentions otherwise expressed. He gave a reason for his acts: his displeasure at the marriage of his grand-daughter, the sufficiency of his grandson's estate, and his desire to aid religious institutions.

Finally, I think there is no reasonable doubt that the will propounded for proof was his will, that it represents truthfully the way in which he wished to dispose of his property—after mature reflection. In the very act of execution, he declares emphatically, "I have a right to exercise my own wish." As he was the maker so was he the disposer of his own fortune. The law treats the right of testamentary disposition with great tenderness. If questioned, it must be on strong grounds. To overturn this solemn, deliberate act, fraud, circumvention, idiocy, or lunacy must be affirmatively established. After the most thorough examination I have been able to make of the mass of testimony in this case, aided by the investigations and arguments of very learned and able counsel, my judgment is that none of these disqualifications have been satisfactorily proved; and I must, therefore, decree sentence of probate.



# INDEX.

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## ACCOUNTING.

*Ses* GUARDIAN, 7.  
WILL, 47, 48.

1. An executor duly served with the original citation and neglecting to appear, though not made party to the appeal, has no right, on the cause being remitted, to litigate the question contested by his co-executors before the Surrogate, and determined by the court above on appeal. *Clayton v. Wardell*. 1
2. Executors having made partial distribution, after notice of a claim, on the establishment of which the estate becomes insufficient to pay all the debts of the deceased, they must nevertheless respond to the creditors to the full extent of all the assets. *Id.*
3. The will of the testator stated that he was desirous of making "a general disposition" of all his estate, real and personal; directed in the first place "all his just debts to be paid;" devised all his real estate to his "executors" on certain trusts, and among others in trust,—if his personal estate should be insufficient, "after payment of his debts," to pay legacies amounting to \$400,000, to his children and their issue,—that his executors "should sell such part of the real estate, as would enable them to make up and provide the said several sums." He gave all the "rest, residue and remainder" of his estate to his executors, and also empowered them, "whenever they should think it expedient, to sell all or any part of his real estate," provided that the change of the character of the funds should not change the disposition thereof. *Bloodgood v. Bruen*. 8
4. The executors having sold the real estate, were cited to account for the proceeds, by a creditor, the personal estate being insufficient for the payment of the debts. *Held*, That the Surrogate had power to call the executors to account for the proceeds of the sales, and to compel distribution in the same manner as if the proceeds had been originally personal property. *Id.*
5. The intestate deposited with R. B. H. certain sums, taking a certificate that the same had been deposited by "*William and Ellen Harkin*;" Ellen Harkin, the wife of William, survived her husband. *Held*, that it was in form a joint deposit; that having been made in this mode, with the privity of the husband,

it was *prima facie* a gift to her in case she survived; and that, not having been disturbed in the lifetime of the husband, it became, on his decease, the absolute property of the wife. *Roman Catholic Orphan Asylum v. Strain.* 84

6. When letters of collection are superseded, and the collector is cited to account, he may be compelled to deliver to the party succeeding to the administration of the estate, all the property of the deceased in his hands; and it is competent for the Surrogate, on the accounting, to pass upon any claim of the collector to property belonging to the deceased at the time of his death, of which the collector acquired title during the period of his collectorship. But where the collector claims title to certain leasehold estate of the deceased, by virtue of a lease from the owner of the fee, made prior to his appointment as collector, the Surrogate has not jurisdiction on the accounting of the collector to try the validity of a title thus acquired before the fiduciary relations of the collector with the estate commenced. *Gottseberger v. Smith.* 86

Upon an accounting, the affirmative of establishing more assets than are acknowledged by the inventory and account, is with the party objecting; and it must be established with reasonable certainty, and not left to mere conjecture or suspicion. *Marre v. Ginocchio.* 165

8. If executors distribute assets, in kind, among the legatees, guaranteeing their collection, and subsequently proceed to a final settlement of their accounts, and a distribution of the remainder of the estate, resort must be had, in case of loss, to their individual guaranty, after a decree

has been entered on the final accounting. *Redmond v. Ely.* 175

9. Service of citation *vis et modis*, i. e., by publication in the case of a non-resident, is a constructive service that concludes the party but not the court, and on sufficient grounds the decree may be opened, to obtain substantial justice.
10. A decree on final accounting will not be opened, unless upon proof that no *laches* was committed, and on such a statement of the alleged error as shall indicate the nature and sufficiency of the grounds for appealing to the equity of the court. *Id.*
11. Trustees created by a last will and testament, or appointed by any competent authority to execute a trust created by will, or executors, or administrators with the will annexed, authorized to execute such a trust, may, from time to time, render their accounts, and have the same finally settled before the Surrogate. *Glover v. Holley.* 291
12. Such final settlement may be made at their own instance, and though they have not been cited to account by parties interested. *Id.*
13. There may be final accounts from time to time, as occasion may require. The *finality* intended by the term final settlement refers to the conclusive character of the accounting, which being made on citation to all parties in interest, is a final and conclusive adjustment up to that period. If assets are afterwards realized, or there are continuing trusts, there may be subsequent accountings in respect to those matters. *Id.*
14. Executors may be allowed for their expenses in the manage-

ment of the estate, but the charges must be reasonable. If necessary, an agent may be employed at the cost of the estate.

*Ib.*

15. On an accounting, the Surrogate has jurisdiction to try every question necessary to the settlement of the accounts. The legatees can adduce evidence to charge the executor with more assets than he acknowledges to have received; and it is competent for him, on the other hand, to show in defence that the assets were his own property, and not part of the testator's estate, at the time of the death. *Merchant v. Merchant.* 482

#### ACKNOWLEDGMENT.

See WILL, 17.

#### ADMINISTRATOR.

See ADMINISTRATION WITH THE WILL ANNEXED, 1, 2, 3. INVENTORY, 6, 7, 8.

1. The fact that the decedent died intestate must be proved before letters of administration issue; and that is ordinarily shown by establishing that no will can be found. *Bulkeley v. Radmond.* 281
2. The grant of letters of administration does not preclude any party in interest from instituting proceedings in the Supreme Court to establish a will lost or destroyed by accident or design; and on the will being proved there, the letters of administration will be revoked. *Ib.*
3. The statute not only prescribes the order of preference between the next of kin, in relation to

the grant of administration, but also declares the rule of competency. Indebtedness to the estate does not render a person incompetent to administer, nor impair his priority of right to administration. *Churchill v. Prescott.* 804

4. Letters of administration on the estate of the deceased, as an intestate, having been issued, and some of the next of kin having applied for a revocation thereof on the ground that the deceased left a will; and it appearing that a will had been executed, but there being no proof that the will was in the possession of the deceased, or unrevoked, at the time of his death,—*Held*, that when administration has been granted, and an existing will or a will lost or fraudulently destroyed, is alleged but not proved, it is generally improper to revoke the letters. *Holland v. Ferris.* 884

#### ADMINISTRATION WITH THE WILL ANNEXED.

1. The direction of the statute, that administration with the will annexed shall be granted to the residuary, general, or specific legatees, or to the widow or next of kin, or to creditors, "in the same manner and under the like regulations and restrictions as letters of administration in case of intestacy," makes it necessary to require a bond with sufficient sureties, in all cases—as well where the grant is made to a legatee as where it is made to the widow, next of kin, or creditors. *Brown, Ex parte.* 22
2. The section requiring "every person appointed administrator" to execute a bond, includes an administrator with the will an

nexed. In general, the term "administrator," in the statutes relative to the estates of deceased persons, includes "administrators with the will annexed;" and the latter are subject to all the provisions applicable to administrators generally, except so far as the distribution of the estate is directed by the will. *Ib.*

3. In the case of a foreign will, it is the usage to grant administration with the will annexed to the attorney in fact of the foreign executor. If there be no one authorised to apply as such attorney, letters issue according to the statute, to the legatees, widow, and next of kin. The grant of administration is regulated by the law of the place where the assets are situated. *St. Jurgis v. Dunscomb.* 105

#### ALLEGATIONS.

See APPEAL, 4, 5, 6, 7, 8, 9.  
WILL, 32.

#### AMENDMENT OF DOCKET.

See REAL ESTATE, 28, 29.

#### APPEAL.

See ACCOUNTING, 1.

1. In a question of legitimacy, it was adjudged by the Surrogate, that C. A. was "not the lawful issue" of G. M., and "was not entitled to any interest whatever in the estate of the said G. M., deceased." On appeal, the Supreme Court decreed, "that the said C. A. is the lawful issue of the said G. M., deceased, and that the said decree of the said

Surrogate be, and the same is hereby, in all things reversed;" and "that the said Surrogate resume and proceed with the accounting in reference to the estate of the said G. M., deceased." This decree was affirmed by the Court of Appeals. On the resumption of the accounting before the Surrogate, an application by the executors of G. M., for leave to furnish additional proofs on the question of legitimacy, was denied. *Clayton v. Wardell.* 1

2. By the course of procedure prevailing in courts proceeding according to the practice and rules of the civil law, the effect of an appeal is to transfer the entire case, not merely for review, but also, if deemed proper, for trial; and it is competent for the appellate court to hear further testimony on the old, or on new allegations. *Ib.*

3. The appellate court may not only affirm or reverse the judgment below, but may modify it, or make an entirely new decree in accordance with its own views of justice; and in such case its adjudication is conclusive, and the Surrogate has no authority to hear further proofs on the point so determined. *Ib.*

4. On allegations filed within a year after probate, the Surrogate confirmed the probate. An appeal was taken to the Circuit Judge, and he affirmed the Surrogate's decision; and an appeal was taken to the Chancellor, which, under the new constitution, was heard and determined by the Supreme Court. The decisions of the Surrogate and the Circuit Judge were reversed upon questions of fact, and the Supreme Court directed a feigned issue to try the validity of the will. *Held*, that until a final decision, the case remains with the appellate court;

and that the decree reversing the orders of the Surrogate and the Circuit Judge, and awarding a feigned issue, was not a final decision. *Mason v. Jones.* 181

5. The Supreme Court having authority to reverse or affirm the judgment, or to retain the case for the purpose of making such further order as might be just, or remit it to the inferior tribunal for that purpose; and having in the present instance, after reversing the orders appealed from, directed a feigned issue, no order can be made by the Surrogate until a final decision of the case, upon the merits, by the appellate tribunal. *Ib.*
6. H. A., one of the next of kin, having within a year after probate filed allegations against the validity of the will and the competency of its proof, and the Surrogate having confirmed the probate, and his decision having been affirmed on appeal by the Circuit Judge, an appeal was taken to the Court of Chancery, and was heard by the Supreme Court, as a proceeding pending in Chancery at the time of the adoption of the new constitution. *Mason v. Jones.* 825
7. By the decree of the Supreme Court, the will was declared not to have been sufficiently proved, the decisions of the Surrogate and the Circuit Judge were reversed upon a question of fact, and a feigned issue was ordered, to try the questions arising upon the application to prove the will on the allegations. The issue was tried, and the jury found that the instrument was not the last will and testament of the deceased. J. M., one of the next of kin, filed with the Surrogate a copy of the verdict, and a certificate of the County Clerk that it was a final determination of the issue by the jury; and he thereupon moved for a revocation of the probate. *Held*, that it was not proper to revoke the probate until the final decision of the issue should be certified by the Court. *Ib.*
8. It seems the statute has not conferred the right upon a party who has not filed allegations and who has not appealed, to contest the probate on allegations filed and appeal taken by another party. Whether, independently of the statute, such right exists by the course of the ecclesiastical practice,—*quare.* *Ib.*
9. When, upon allegations, it has been fully determined that the will is not sufficiently proved, any of the next of kin not a party to the contest, may avail himself of the decision though it was not obtained at his instance. *Ib.*
10. Proceedings in respect to probate or administration, are not properly suits or actions, but are special proceedings of a mixed character, capable of being promoted by any one interested; and, when finally determined, the judgment partakes so far of the character of a judgment *in rem*, that any other party in interest can avail himself of it. *Ib.*
11. The final decision as to testacy or intestacy, when regularly obtained, is conclusive as to all the world. *Ib.*
12. The only case where the statute directs a feigned issue as to the validity of a will, on appeal, is where the Circuit Judge has reversed the decision of the Surrogate on a question of fact. *Ib.*
13. In the present instance, the decree of the Supreme Court was not a final determination upon the merits, but contemplated fur-

ther proceedings before deciding upon the validity of the will. If the trial of the issue took place under the provisions of the statute, the Supreme Court had power to order a new trial. If the issue was a feigned issue out of Chancery, for the purpose of informing the Court, the verdict may be set aside, or judgment be given without regard to the verdict. *Ib.*

### APPRAISERS.

See INVENTORY, 2, 3.

### ASSETS.

See ACCOUNTING, 8, 9, 15.

INVENTORY, 7, 8.

REAL ESTATE, 1, 2, 16, 17, 18.

### ATTESTATION.

See WILL, 12, 13, 14.

WITNESS, 1, 2, 3.

### BEQUEST.

See DEVISE, 1.

WILL, 40, 41, 43, 44.

1. Legacies ordinarily carry interest from the time they are payable, which is usually a year after the testator's death. The bequest of a life-estate to a child, or to a widow in lieu of dower, are exceptions to the general rule; and in such cases the legatees take interest from the testator's decease. *Hepburn v. Hepburn.* 74
2. The testator gave to his widow a legacy of one thousand dollars, out "of money in the safe keep-

ing of R. S., at lawful interest." This, with other gifts, was declared to be in lieu of dower. By a codicil, after reciting that by his will she was "cut short of an interest" in his landed estate, he gave her the annual interest on two thousand dollars, loaned to B. C. *Held*, that all the legacies were intended as compensation for dower, and carried interest from the testator's death, on the ground that they were given as an equivalent for the relinquishment of a right, and the legatee had no other means of support under the will. *Held*, also, that the legacies were in the nature of specific bequests, so that the accruing interest passed to the donee on the testator's decease. *Parkinson v. Parkinson.* 77

3. The testator gave his wife the use, for three years, of his house, either to occupy or to let, and at the expiration of that time directed the premises to be sold by his executors, and the proceeds to be divided between his two sons, *Held*, that the widow was bound to keep down the ordinary taxes during the term. *Ib.*
4. The testator gave a moiety of the residue of his estate to his wife, "her heirs and assigns," and the other moiety to the "children" of his late brother and sister, "their heirs and assigns;" and he authorised his executors to sell his estate, and allow his "wife to take the moiety thereof, and pay the other moiety thereof to the children of his said late brother and sister." At the death of the testator as well as at the date of the will, several of the children of his brother and sister were dead,—*Held*, that the term *heirs* was a word of limitation and not of purchase; and issue of the testator's nephews and neices could not take. *Stires v. Van Rensselaer.* 172

5. In case of a bequest to children, as a class, it is a general rule that only those living at the date of the will can take, unless an intent to the contrary can be deduced from other portions of the will. *Ib.*
  6. When a bequest is made to a class, the death of one before the testator does not cause a lapse, but all those answering the description of the class at the testator's death take the whole. *Ib.*
  7. The will gave the testator's daughter, E., the use of certain property for life, and on her decease, directed a sale and the distribution of the proceeds.—Among the legacies was one to M., to be paid to her "in small sums from time to time," at the discretion of the executors. The legatee survived the testator, but died before the life-tenant. *Held*, that the direction to convert into money was absolute; that the interest of the legatee in the remainder, after the termination of the life estate, was not contingent on her surviving the life-tenant, but she took a vested legacy on the testator's death, which, in case of her decease before payment, passed to her legal representatives. *Held*, also, that the discretion of the executors, in respect to the legacy to M., related to the time and mode of payment, and did not prevent the vesting of the legacy. *Conklin v. Moore.* 179
  8. After the expiration of a life estate, the will directed the sale of the property and the payment of several legacies, and then gave one half of all the residue of the estate to P. D. and her six children, "and to the survivor and survivors of them." P. D. survived the testator, but died before the life-tenant; and it was held that her legacy did not lapse. *Dominick v. Moore.* 201
  9. The general rule is, that all legacies vest on the testator's decease, and to prevent the vesting the contrary intention must be clear. A clause of survivorship is ordinarily referable to the same period—the death of the testator—unless the distribution is postponed till the determination of a life estate, in which case the weight of authority *seems* to incline in favor of referring the survivorship to the period of distribution. *Ib.*
  10. The gift of a general residue, and not merely of the remainder in a particular portion after the death of a life-tenant, does not constitute an exception to the general rule; but in such case the bequest vests on the testator's decease, although a portion of the subject matter is a remainder after a life estate. *Ib.*
  11. The testator having given his wife the clear income of certain real estate, and an assessment having been levied upon the premises, for a permanent improvement, *Held* that the life-tenant should pay the annual interest on the assessment, and that the principal should be charged against the remaindermen. *Stilwell v. Doughty.* 811
- BIRTH OF CHILD.
- See REVOCATION, 6, 7.*
1. By the civil law, the birth of a child, which the testator did not foresee, revoked the whole testament, but did not revoke a codicil, where there was no testament. *Bloomer v. Bloomer.* 840

2. By the common law, the birth of a child, in connection with other circumstances, might be sufficient to establish an implied revocation. This rule has been adopted in this country, either to the extent of revoking the will entirely, or *pro tanto*, so as to let in the children born after the making of the will. *Id.*

## CAPACITY (TESTAMENTARY).

*See* WILL, *passim*.

## CHILDREN.

*See* BEQUEST, 4, 5.

## CITATION.

*See* ACCOUNTING, 1, 9.

## CLAIMS (ADVERTISEMENT FOR).

The advertisement for claims protects the executor, in case of distribution after the advertisement has expired. *Clayton v. Wardell*. 1

## CLAIMS (PAYMENT OF).

*See* CREDITOR, 1, 2, 3, 4, 5, 6.  
PRIORITY, 1, 2.

## COLLECTOR.

*See* ACCOUNTING, 6.

## CONDITIONAL WILL.

*See* WILL, 22, 23.

## CONSTRUCTIVE APPOINTMENT.

*See* EXECUTOR, 1, 2, 10.

## CONVERSION.

*See* DEVISE, 1.  
REAL ESTATE, 2.

## CREDITOR.

*See* ACCOUNTING, 2.  
DISTRIBUTION, 1, 2.  
NECESSARIES.  
PLEADINGS AND PRACTICE;  
1, 5, 6.  
PRIORITY, 1, 2.  
REAL ESTATE, *passim*.  
SET-OFF, 1.

1. The claim of an executor or administrator against the deceased has no priority over the demands of other creditors. *Treat v. Fortune*. 116
2. An executor or administrator cannot retain assets of the estate in payment of his own demand, until it has been proved to and allowed by the Surrogate, which allowance can be made on citing the parties in interest, or on the final accounting. *Id.*
3. On an application for the payment of a debt, where the claim has been assigned and the proof depends chiefly on the evidence of the assignor, *Held*, that, inasmuch as in an action at law the assignor would not be a competent witness for the claimant, it was proper for the Surrogate to dismiss the petition, leaving the alleged creditor to his action. *Woodruff v. Cox*. 223
4. The intestate's wife left his residence, taking their child with her, and for seven years resided with her parents, in Pennsylvania. After her death, the hus-

band of the child's maternal aunt brought her to New York, and took her to reside with him, where she continued for five years, until the decease of her father, without any demand being made on the father to assume the care of his daughter, or to pay for her support. *Held*, that there was no legal obligation on the intestate to compensate the uncle for the support of the child during the period in question, and a claim against the estate of the deceased, for necessities furnished, was accordingly rejected. *Bitel v. Walter*. 287

5. The brother of the intestate, nearly two years after his death, presented a claim for services and assistance in his business, for a period of five years before his decease. It appearing that the claimant was boarded and clothed by the intestate,—*Held*, under the circumstances, that no express contract having been proved, and no demand shown in the intestate's lifetime, the law did not imply an agreement to compensate the claimant. *Bowen v. Bowen*. 336
6. Demands of this nature are not to be regarded with any favor; and the evidence should be clear, that the services were performed under a mutual expectation of compensation. *Id*.

# DECLARATION (TESTAMENTARY).

*See* WILL, 17, 18, 50.

## DECREE.

*See* ACCOUNTING, 8, 9, 10.  
APPEAL, 4, 5.  
PLEADINGS AND PRACTICE, 1.  
WILL, 10.

## DESCENDANTS.

*See* DEVISE, 2, 3, 4.

## 'DEVISE.

*See* REVOCATION, 8.  
WILL, 40, 41, 43, 44.

1. The testator devised certain property to his wife during her widowhood, *until* his youngest son should arrive at age, *when* he directed it to be sold by his executors, and the proceeds to be distributed as prescribed in his will. After sundry legacies, he gave "all the rest, residue, and remainder," of his estate to his wife absolutely. The widow having died, the assignee of parties entitled to legacies out of the proceeds of property devised to the testator's wife during her widowhood, cited the executor to account, claiming that on the death of the widow, the time designated for the sale of the premises had arrived—*Held*, that the direction to sell was *conditional*, and the legatees of the proceeds of the sale when made, have no claim until the power can be executed according to the provisions of the will. The time set for the execution of the power is, "when" the testator's youngest child should attain majority. A direction to convert realty into personalty to pay legacies, is not accelerated so long as the condition on which it is to take effect is capable of literal consummation. *Hall v. McLaughlin*. 107
2. In case of a devise to brothers and sisters surviving at the testator's decease and the *descendants* of such as should then be dead, such *descendants* to take the share or portion which would have otherwise belonged "to such deceased *parent*,"—at the testator's death there were four

surviving sisters,—and descendants, children and grandchildren, of six deceased brothers and sisters,—*Held*, that the four sisters each took one-tenth, and the descendants of each deceased brother and sister took one-tenth. *Barstow v. Goodwin.* 418

3. The term descendants properly includes every person descended from the stock referred to. A devise to descendants *equally* to be divided between them, embraces all the descendants of every degree, *per capita.* *Id.*
4. Whether descendants are to take *per capita* or *per stirpes* is, however, a question of intention, to be judged of by the will. A devise to descendants of the share of their deceased *parent*, in connection with other portions of the will tending to show that the testator looked to the principle of representation, may restrain the import of the term descendants to children and the descendants of children, so that they take *per stirpes*, and not *per capita.* *Id.*

### DISTRIBUTION.

See ACCOUNTING, 1, 2, 3, 4.  
CLAIMS, ADVERTISEMENT FOR,  
1.  
DEVISE, 8, 4.  
PRIORITY OF PAYMENT, 1, 2.  
WILL, 43, 44.

1. The statute directing judgments docketed, and decrees enrolled against the deceased, to be paid, according to their respective priorities, before bonds and other obligations, does not refer to foreign judgments, or to judgments recovered in the courts of other States. *Brown v. Public Administrator.* 108
2. A judgment recovered in another State, has no greater force,

in respect to the distribution of the assets of a deceased person, than a foreign judgment. Neither at common law, nor under the statutes of this State, have judgments recovered in another State any title to priority of payment over simple contract debts. Creditors claiming on such judgments, must come in with the creditors of the deceased, described in the fourth class of the section of the statute, which prescribes the order in which debts shall be paid. *Id.*

3. A testator gave his property equally among his children, directing that the shares of his daughters should be invested independently of any control of their husbands, but "the same shall be and accrue, solely and exclusively, to the benefit of my said daughters and their lawful issue." One of the daughters having died, leaving six children surviving, *Held* that on the subsequent decease of one of the six, intestate, leaving no descendant or widow, the father, after administration, was entitled to her share. *Harring v. Colas.* 849

### DOMICIL.

See GUARDIAN, 2, 3, 4, 5, 6.  
WILL, 19, 20, 42, 43.

### DONATIO INTER VIVOS

See ACCOUNTING, 5.

### DONATIO MORTIS CAUSA.

1. Gifts *causa mortis*, should be sustained by the most satisfactory testimony. Evidence of the donee, uncorroborated by cir-

- cumstances, is insufficient to establish the donation. Delivery is essential to the validity of a *donatio causa mortis*, and is corroborative proof that the donation was made; but possession does not prove delivery, when the claimant has had opportunities of obtaining possession wrongfully. *Kenney v. Public Administrator*. 319
2. Where the alleged donee was an attendant on the deceased during her last sickness, and both before and after her death denied any knowledge of the subject of the alleged gift—*Held*, that having assigned her rights to her son and become a witness, there was not, under the circumstances, such clear proof as the nature of the case required. *Id.*
  3. Gifts *causa mortis*, are of a mixed nature, resembling gifts *inter vivos* in the essential requisite of delivery, and resembling legacies in being subject to the debts of the deceased, and in being ambulatory or revocable, and contingent on death. *Bloomer v. Bloomer*. 340
  4. By the law of Connecticut a will, whether making a total or partial disposition, is revoked by the subsequent birth of a child, if no provision has been made in the instrument for that contingency; and where a will would be revoked by such a circumstance,—*Held*, that a *donatio causa mortis* would likewise be revoked. *Id.*
  5. The testator, having made an unequal will, gave to his son, during his last illness, three bonds. Subsequently, having executed another will, placing the donee nearly on an equal footing with his sisters, the bonds were brought to him by his wife, with whom the donee had deposited them; and he directed them to be put back in the box where he kept his valuable papers. The day before his death he directed one of his daughters to bring him the box, and see if the bonds were there. They were shown to him: he said it was right, directed them to be replaced, the box to be locked, and the key to be given, on his decease, to R., one of his executors,—*Held*, as the gift was made during the last illness, from which the testator did not expect to recover, that by presumption of law, it was intended as a *donatio mortis causa*, was revocable in its nature, and was, in fact, revoked before the donor's death. *Merchant v. Merchant*. 492
  6. A will does not revoke a gift *causa mortis*; because the will does not speak till the testator's death—the moment the donation by its terms has become absolute. *Id.*
  7. A *donatio mortis causa* is revocable at the option of the donor and without the consent of the donee, whether the donor recover or not. *Id.*
  8. There are three conditions annexed by law to a gift *causa mortis*, which on happening defeat the donation: the recovery of the donor, his repentance of the gift, and the death of the donee before the donor's decease. *Id.*
- DOWER.
- See* BEQUEST, 1, 2.
- EVIDENCE.
- See* ACCOUNTING, 7.  
ADMINISTRATOR, 1.  
CREDITOR, 3.  
DONATIO MORTIS CAUSA, 1, 2.

INVENTORY, 2, 7.  
 MARRIAGE, 2.  
 MARRIED WOMEN, 3.  
 PLEADINGS AND PRACTICE,  
 6, 7, 8.  
 REVOCATION, 1, 2, 3, 4, 5.  
 WILL, 4, 5, 13, 14, 16, 25,  
 26, 27, 28, 29, 30, 31,  
 33, 34, 35, 37, 39.  
 WITNESS, 3, 4.

1. A creditor of the estate is not a competent witness to swell the fund out of which he is to be paid, when the estate is insufficient to pay the debts. *Marre v. Ginochio*. 165
2. As a general rule, the competency of evidence is governed by the *lex fori*, and not the *lex domicilii*. *Bloomer v. Bloomer*. 340

### EXECUTOR.

See ACCOUNTING, 1, 2, 3, 4, 6,  
 8, 11, 14.  
 CLAIMS, ADVERTISEMENT FOR,  
 1.  
 CREDITOR, 1, 2.  
 REAL ESTATE, *passim*.

1. The appointment of an executor may be express or constructive, and though a person be not appointed executor by that name, yet if the testator commit to his charge duties which it is ordinarily the province of an executor to perform, the intention to invest him with that character may be inferred. *McDonnell, ex parte*. 32
2. Where the testator by his will said, "After all my just debts being paid, I wish my brother, E. M. D., to invest all my property, consisting of a farm, &c., six hundred dollars, &c., in the Greenwich Savings Bank, &c., and chattel property when converted into cash; and the interest accruing thereupon to be trans-

mitted to my father; and the capital, at my father's death, to be divided among my three brothers,—*Held*, that E. M. D. was designated to execute the will, and was executor according to the tenor. *Id.*

3. An executor is not bound to prosecute a claim of very doubtful character, at the request of parties having only a contingent interest in the estate, unless they indemnify the estate against the costs. *Hepburn v. Hepburn*. 74
4. Where there are life estates in personalty, and the will directs the fund to be invested, the investment should be made for the security of the parties who shall ultimately be entitled to the capital. *Id.*
5. Where real and personal estate are mingled together, and disposed of in the same way, the personalty may be applied to the payment of a mortgage on the realty, if that be a safe investment, and necessary for the preservation of the property. Interest accumulated before the testator's decease should be paid out of the principal and not out of the income accruing after his death. *Id.*
6. If, after letters testamentary granted to a *femme sole* executrix, she shall marry, her husband is liable for her acts before and after marriage, and they may be sued jointly. It is not necessary, in order to make the husband liable, that he should file a consent with the Surrogate; that is requisite only when the executrix is a *femme covert* at the time she receives letters. Marriage after letters granted is as effectual a consent as a written consent, under the statute after marriage, before letters granted; and in either case, the husband and wife

are jointly responsible and liable to account in the Surrogate's Court. *Woodruff v. Cox.* 153

The power of the husband of a married woman executrix is substantially that of an executor. His wife cannot act without his concurrence, and he has the power of disposition over the estate. *Ib.*

8. In all proceedings relative to the estate, either the party moving or the executrix may set up the joint liability of the executrix and her husband; and the husband will then be cited jointly with his wife, to abide the orders of the Court in the due administration of the estate. *Ib.*

9. The husband of a *femme coverte* executrix is jointly liable with his wife in the Surrogate's Court; and where the husband was the surviving partner of the testator, it was *held* that a statement of the partnership affairs was incidentally necessary to the settlement of the accounts of the estate, and that the husband of the executrix must render such co-partnership account. *Marre v. Ginocchio.* 165

10. A provision in a mutual will, that the survivor shall remain in full possession of all the estate, without the interference of any court, has the effect of devolving upon the survivor the whole administration of the estate. It is a constructive executory appointment according to the tenor. *Ex parte McCormick.* 169

11. An executrix, after letters issued and before the will was adjudged to have been revoked, having, under the testamentary directions, paid out of the personal estate a mortgage on the realty,—*Held*, that having acted in good faith, the payment must

be allowed, leaving the legatees and next of kin to their claim against the land for the sum so paid. *Bloomer v. Bloomer.* 840

## FEIGNED ISSUE.

*See* APPEAL, 4, 5, 7, 12, 13.

## FINAL ACCOUNTING.

*See* ACCOUNTING, 12, 13.

## GIFT.

*See* DONATIO.

## GUARDIAN AND WARD.

1. The Surrogate has jurisdiction to grant letters of guardianship only in case of minors residing in the county. *Brown v. Lynch.* 214
2. Where the parents resided and were married in the State of Connecticut, and the child was born there, the father having previously removed to New York, where the mother, after the birth of her infant, joined him—*Held*, that the original domicil of the minor was that of his parents at the time of his birth. *Ib.*
3. On the death of the father, the establishment in New York having been broken up, and the mother, with her child, removed to the residence of her parent in Connecticut—*Held*, that the domicil of the minor was changed to that State. *Ib.*
4. The mother having married again, and left Hartford to reside at New York with her husband—*Held*, that although by

marriage she adopted the domicile of her husband, the domicile of the child was not thereby changed. *Id.*

5. The mother, after the father's death, may change the domicile of her children, provided it be without fraudulent views to the succession of the estate. The domicile of the children does not necessarily follow that of the surviving mother; for, although changing her own, she may, from wise motives, refuse to alter that of the child. The presumption, however, is, that their domicile follows hers. But this rule does not obtain on the second marriage of the mother. By that act she acquires the domicile of her husband, and loses all power to control that of her children. *Id.*

6. Although the *forum* of the minor may follow that of the surviving mother, yet on her decease the forum of the minor is restored to the place of his domicile. *Id.*

7. Where the father was guardian of his children, and, possessing limited means, was compelled to labor for their support, and in consequence of the decease of their mother was put to increased expense—*Held*, that it was reasonable, under the circumstances, to charge a portion of the expense for their maintenance upon the income or interest of the shares of his wards. *Harring v. Coles.*

349

### HEIRS.

*See* BEQUEST, 4.

REAL ESTATE, 12, 13, 16,  
20, 21, 22, 24, 25, 26.

### HUSBAND AND WIFE.

*See* ACCOUNTING, 5.

EXECUTOR, 6, 7, 8, 9.

MARRIED WOMEN, 1, 2, 3.

### INSANITY.

*See* WILL, 52.

### INTEREST.

*See* BEQUEST, 1, 2, 11.  
EXECUTORS, 5.

### INVENTORY.

1. If, on taking the inventory, the property directed by statute to be set apart for minor children, was not so apportioned, the error may be corrected on the accounting. *Clayton v. Wardell.* 1

2. The statute which directs the appraisers, on taking an inventory, to set apart for the use of the widow and minor children—in addition to certain specified articles—other personal property to the value of not exceeding one hundred and fifty dollars, does not vest an absolute discretion in the appraisers. They cannot set apart property exceeding one hundred and fifty dollars in value. The appraisers are officers appointed by the Surrogate to estimate and appraise; and their appraisement is not conclusive, but may be reviewed, examined, and corrected. *Applegate v. Cameron.* 119

3. If the appraisers neglect to set apart property for the widow and minor children, or make a valuation palpably erroneous, whether from fraud or mistake, the Surrogate may direct the error or mistake to be rectified. *Id.*

4. Where articles were set apart, valued at a sum exceeding one hundred and fifty dollars—*Held*, that the act was, on its face, a violation of the statute, and invalid. *Id.*

5. The provisions of the statute directing certain articles to be set aside in the inventory for the benefit of the widow and minor children of the deceased, are not limited to cases where the deceased was a *resident* of this State. These articles are not *assets*, do not belong to the executor or administrator, and are not the subject of administration and distribution. *Kapp v. Public Administrator.* 258

6. Where the intestate died on his way to this country, leaving a widow and minor children in Germany, and the assets left on board of the vessel came into the hands of the public administrator, nothing having been set apart in the inventory for the widow and children—*Hild*, that the inventory should be reformed in that respect. *Id.*

7. The rule that the inventory cannot be impeached, relates only to proceedings in relation to the inventory itself. It may be shown on the accounting of the administrator or executor, that the assets were not correctly stated in the inventory. *Montgomery v. Dunning.* 220

8. Where partnership property has come into the hands of an administrator, he is no further accountable than for the share of the deceased in the partnership assets, after payment of all the liabilities, and a full settlement of all the partnership accounts. *Id.*

## JUDGMENT.

*See* DISTRIBUTION, 1, 2.

PRIORITY, 1, 2.

REAL ESTATE, 26, 27, 28, 29.

## JURISDICTION.

*See* ACCOUNTING, 6.

APPEAL, 1, 2, 3.

GUARDIAN, 1.

INVENTORY, 1.

REAL ESTATE, 3, 4.

WILL, 9, 36, 42, 43.

## LAPSE.

*See* BEQUEST, 4, 5, 6, 7, 8, 9, 10.

## LEGACY.

*See* BEQUEST, *passim*.

## LETTERS TESTAMENTARY.

*See* EXECUTOR, 6, 7, 8.

PLEADINGS AND PRACTICE, 5, 9.

## LEX LOCI.

*See* WILL, 43.

## LIEN.

*See* REAL ESTATE, 26, 27, 28, 29.

## LIMITATIONS (STATUTE OF).

*See* PLEADINGS AND PRACTICE, 2, 3.

REAL ESTATE, 10, 12, 13, 15.

Whether, when a cause of action has accrued, and the statute commenced running, and the debtor dies within six years, it is an answer to a plea of the statute, that by reason of litigation as to the probate an executor was not appointed until the six years had expired, and that

suit was brought within a reasonable time after probate granted, *quære?* *Skidmore v. Romaine*, 122

### MARRIAGE (PROMISE OF).

1. According to the canon law, a promise of marriage, *per verba de futuro*, i. e., to become husband and wife at some future time, if the promise was followed by consummation, constituted a valid marriage. Whether that is the rule of law existing in this State—*quære?* *Turpin v. Public Administrator*. 424
2. Where no promise of any kind was proved, except that the claimant declared after the decedent's death, that she was not married to him, but he had said that he had some trouble on his mind, and when that was settled would marry her; and where the parties, though having connection and children, did not live together, but their relation was clandestine, and there was no open acknowledgement or common reputation, and both parties denied marriage—*Held*, that there was not sufficient in the circumstances from which to infer a marriage. *Id.*
3. When parties are living in a meretricious state, a promise to marry on a future condition, does not effect a marriage by a mere continuation of that connection. *Id.*

### MARRIED WOMEN.

1. Married women, by the act of 1849, are competent to devise and bequeath real and personal

property in the same manner and with the like effect as if they were unmarried. *Waters v. Outlen*. 354

2. The operation or effect of the will, on the estate or rights of the husband in the property of the wife, cannot be considered on the probate. *Id.*
3. It is the duty of the Surrogate, on proof of due execution, to admit the will to probate, leaving the question as to what passes under the instrument, for future construction. *Id.*

### MINOR.

*See* CREDITOR, 4.  
GUARDIAN AND WARD, 1, 2,  
8, 4, 5, 6, 7.  
INVENTORY, 1, 2, 3, 4, 5, 6.

### MUTUAL WILL.

*See* WILL, 1, 19.

### NECESSARIES.

*See* CREDITOR, 4.

Where necessities are furnished to a person of weak or impaired capacity, and no fraud or imposition is practised, a debt is created, which, on his decease, will be a charge against his estate; provided the articles furnished were suitable to his circumstances, pecuniary and social, and to his ordinary mode and habit of living. *Skidmore v. Romaine*. 123

### NEXT OF KIN.

*See* ADMINISTRATOR, 3.

PARENT AND CHILD.

See CREDITOR, 4.  
GUARDIAN AND WARD, 2,  
3, 4, 5, 6.

PARTNERSHIP.

See INVENTORY, 8.  
EXECUTORS, 9.

PER CAPITA.

See DEVISE, 2, 3, 4.

PER STIRPES.

See DEVISE, 2, 3, 4.

PERSONAL ESTATE.

See EXECUTORS, 5.  
REAL ESTATE, 2, 11, 17,  
19.

PLEADINGS AND PRACTICE.

See ACCOUNTING, 1, 6, 7, 9, 10,  
11, 12, 13.  
ADMINISTRATION WITH WILL  
ANNEXED, 1, 2, 3.  
ADMINISTRATOR, 2.  
APPEAL, *passim*.  
CREDITOR, 2, 3.  
EXECUTOR, 6, 7, 8.  
INVENTORY, 3, 7.  
MARRIED WOMEN, 2, 3.  
REAL ESTATE, 8, 9, 10, 12,  
13, 14, 15, 16, 20, 21,  
22, 26.  
WILL, 9, 20, 28, 29, 36.

1. Several suits may proceed in the same court or in courts of concurrent jurisdiction, by plaintiffs seeking an account of executors and administrators, and payment of their respective claims; but when a decree for a general account and distribution is made in one suit, and the other

creditors are authorized to come in under the decree and obtain satisfaction of their demands, the other suits will be stayed. But if provision is not made in the decree, for the payment of the claims of all creditors, or allowing them to apply for payment under the decree, such other creditors are not barred from proceeding in their own suits to a final decree. *Bloodgood v. Bruen.* 8

2. In administration suits it is not the exclusive right of the executor or administrator to plead the statute of limitations, but that may be done by any party interested in the fund. *Treat v. Fortune.* 116

3. The statute of limitations may be set up in bar to a demand of the executor or administrator when he proceeds to prove the same, as provided by statute. *Id.*

4. The code of procedure does not apply to proceedings in Surrogates' Courts, further than has been expressly provided therein. In the first part, Surrogates' Courts are enumerated in the 9th class of courts of justice; and the second part relates only to civil actions. The 471st section declares that the second part shall not affect proceedings upon mandamus or prohibition, nor appeals from Surrogates' Courts, nor any special statutory remedy not heretofore obtained by action. Proceedings in Surrogates' Courts are not actions, but are special statutory proceedings. *Woodruff v. Cox.* 223

5. After probate and before issue of letters testamentary, a creditor or other party in interest may file an affidavit of intention to present objections against the grant of letters. *Burwell v. Shaw.* 322

6. Whether the objector is a creditor may be disputed, and is a subject of proof not regulated by the statute nor determined by the affidavit. *Ib.*

7. The oath of the objector that he is a creditor, is enough in the first instance; but if the demand be denied, the objector will be compelled to set forth the particulars of his debt so as to indicate its nature and basis. *Ib.*

8. In all cases the question of interest may be raised, and it must be determined by the Surrogate. Where it is a question of substance, adverse testimony will be received; but in applications for an inventory, account, or increased security, the applicant is required merely to state his interest positively under oath, and if the facts stated show an interest, the merits of the claim will not be tried. *Ib.*

9. When an affidavit of intention to present objections has been filed, it is competent for the Surrogate, at the instance of the executor, to order the objections to be filed. The stay of the grant of letters thirty days does not stay proceedings on the objections within the thirty days. *Ib.*

### POWERS.

*See* ACCOUNTING, 3, 4.

DEVISE, 1.

REAL ESTATE, 1, 2, 8, 4.

### PRIORITY OF PAYMENT.

1. A judgment against a surety on a stipulation in admiralty, recovered after the death of the stipulator, is not entitled to pri-

ority of payment out of his assets. The provision of the statute authorising judgments, in certain cases, to be entered against the deceased after his death, and declaring that such judgments shall not bind the real estate, but be considered as debts payable in the usual course of administration, relates to judgments in our own courts. *Bernes v. Weissner.* 212

2. Whether judgments recovered in the life-time of the deceased, in the United States Courts of this District, are entitled, under the statute, to priority of payment—*quære?* *Ib.*

### PROBATE.

*See* APPEAL, 4, 18.

WILL, 6, 7, 8, 10, 22.

### REAL ESTATE.

*See* ACCOUNTING, 3, 4.

BEQUEST, 11.

DEVISE, 1.

WILL, 40, 42, 43.

1. The distinction as to legal and equitable assets, no longer prevails as to the proceeds of the sale of realty, but such proceeds, when the real estate is sold by order of the Surrogate, are distributed in the same manner to creditors as the personal estate. The only effective remedy provided by statute for the specific application of the realty to the discharge of debts, is vested in the Surrogate's Court. *Bloodgood v. Bruen.* 8

2. Where the will directs a conversion of the real into personal estate, the money arising from the sale becomes legal assets in

- the hands of the executor, for which he is bound to account before the Surrogate. If a mere *authority* to sell is given to the executor, he may bring the proceeds into the Surrogate's office for distribution, as the proceeds of the sale of real estate. *Id.*
3. If the intention of the testator to charge the debts upon the real estate can be gathered from the will, and the executors have a power of sale, under which they have acted, they may be cited to account and distribute, —the intention to charge the debts on the realty affecting the power so as to make an imperative power in trust, tantamount to a peremptory order to sell in case of the personalty being insufficient to pay the debts. *Id.*
4. If the real estate is ordered to be sold for the payment of *legacies*, the Surrogate has power to compel distribution at the instance of *creditors* or legatees. *Id.*
5. Where the whole estate, real and personal, was given for life to S. and G., with remainder in fee to the issue of G., and in case he died without issue, then over; and the executors were authorized to take charge of, and rent the real estate, invest the personal estate, and pay the whole income to the life tenants, —*Held*, that all ordinary taxes, assessments, interest on incumbrances, and charges for repairs, should be kept down and paid out of the income. *Hepburn v. Hepburn*. 74
6. A claim for the mesne profits of lands occupied by an intestate may be allowed out of the proceeds of his real estate, sold for the payment of his debts. *Campbell v. Remwick*. 80
7. It is competent on the sale of real estate, for the payment of the debts of the deceased, or on the distribution of the proceeds, to offer any equitable defence against the claim of a party alleging to be a creditor; and the heirs are not restricted to a legal defence. *Id.*
8. The common-law action of trespass for mesne profits was not abolished by the Revised Statutes. Trespass being an action for a tort, died with the party defendant, and did not survive against his executor or administrator. *Id.*
9. It is, however, provided, by statute that for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, an action may be brought after his death against his executors or administrators, in the same manner, and with the like effect, as actions upon contracts. *Id.*
10. An action for use and occupation lies only where the relation of landlord and tenant has existed, founded on some agreement, express or implied. The Revised Statutes have transformed the claim for mesne profits, consequent on a recovery in ejectment, into a proceeding in the nature of an action for use and occupation. Mesne profits can only be recovered for a period of six years previous to the commencement of the action. The term of eighteen months is not deemed any part of the time limited by law for the commencement of actions against an administrator or executor. In a proceeding for the sale of real estate for the payment of debts, the Surrogate may award a feigned issue. *Id.*

11. Where a creditor has sued the executors, and on their offer to permit a recovery for a certain sum, has taken judgment for that amount, the claim is liquidated, and he cannot recover a larger sum in a proceeding to sell the real estate of the deceased for the payment of his debts. The personal estate is the primary fund for the payment of debts, and the measure of recovery against the realty cannot exceed that against the personalty, though it may be less. *Skidmore v. Romanne.* 122
12. On application to sell the real estate of the deceased for the payment of his debts, the devisees or heirs may set up the statute of limitations against the claims of creditors. *Ib.*
13. An application for the sale of real estate for the payment of debts is not, in a strict sense, an action. The term of eighteen months after the death of a testator or intestate forms no part of the time limited by law for the commencement of an action against his executors or administrators; and an action for the debts of the deceased cannot be brought against his heirs or devisees within three years from the time of granting letters. *Ib.*
14. Proceedings to compel the sale of the real estate for the payment of debts, cannot be instituted by a creditor until the executor or administrator has accounted; and an account cannot be compelled till the lapse of eighteen months after letters issued. *Ib.*
15. Where on the decease of the testator the statute of limitations had commenced to run against certain simple contract debts, and in consequence of a contest as to the probate, letters testamentary were not granted until five years after, and the six years from the creation of the debt expired after letters were issued, but before the creditors could compel an account,—*Held*, that the claims were not barred by the statute of limitations. *Ib.*
16. In proceedings to sell the real estate for the payment of debts, it is competent for the heirs or devisees to show that the personal estate has not been applied to the payment of the debts: but the sale may be ordered by the Surrogate, if he has satisfactory evidence that the executor or administrator has proceeded with reasonable diligence in making such application. *Ib.*
17. Executors will not be required to sell leasehold premises, on which the testator has erected a private vault, in which he was interred, and in regard to which special directions were contained in the will,—before the real estate can be sold for the payment of debts. *Ib.*
18. Whether specific legatees, whose legacies are encroached upon for the payment of debts, are entitled to have the assets marshaled against devisees, *quære?* *Ib.*
19. Where the personal estate that had come to the hands of the executors was insufficient for the payment of all the creditors, and there were controverted questions between the legatees and devisees necessary to be determined before ascertaining whether the personal estate was sufficient to pay the debts, and the executors had in their hands rents of the real estate collected during the contest as to the probate,—*Held*, that the debts might be paid out of that fund; the legatees and devisees being left to the settlement of their respec-

tive rights and claims in a court of competent jurisdiction. *Ib.*

20. The intestate was the owner of an undivided fourth part of certain lots of land; and after his decease, one of the tenants in common instituted a suit in the New York Common Pleas for partition. The proceedings were regularly conducted to a decree, the premises sold, deeds given, and the proceeds of sale distributed among the parties. The personal estate having been insufficient to discharge the intestate's debts, a creditor applied for the sale of the real estate of which he died seized, for the payment of his debts, and the administrators were ordered to show cause why the application should not be granted. The administrators set up the sale in partition and distribution of the proceeds; and it was *Held*, that the administrators, not representing either the heirs or the purchaser, it was not competent for them to raise the objection. *Richardson v. Judah.*

157

21. If, on the return of the order requiring the administrators to show cause, it appears that all the personal estate has been applied to the payment of debts, and that there remain claims unpaid, for the satisfaction of which a sale of the real estate may be made, the Surrogate is bound to issue the second order requiring all persons *interested* in the estate to show cause against the application. On the return of this last order, the heirs, or parties claiming under them, may intervene and oppose the proceedings. *Ib.*

22. If, on the return of the order requiring the administrators to show cause, they allege that other persons besides the heirs are interested, it is proper to direct the service of the second order

on such parties, though the statute does not demand such service. *Ib.*

23. On the motion to confirm the report of sale, in proceedings for the sale of the real estate of a deceased person for the payment of his debts, if it appear that a sum exceeding ten per cent. on the bid, exclusive of expenses of a new sale, can be obtained, it is the duty of the Surrogate to vacate the sale, and direct another to be had. If such an advance cannot be obtained, and the sale has been legally made and fairly conducted, the Surrogate is imperatively required to confirm the sale. *Horton v. Horton.* 200

24. The surplus of the proceeds of the sale of the real estate of a deceased person, remaining after the payment of his debts, is distributable among his heirs, or the persons claiming under them. *Sears v. Mack's Assignees.* 394

25. The sale and conveyance by the administrator, under the order of the Surrogate, pass all the estate, right, and interest of the deceased in the lands at the time of his death, and oust the title of the heirs and all persons claiming under them. But the title of the heirs to the surplus of the proceeds, is recognized by the statute. *Ib.*

26. If, at the time of the sale, there are liens by mortgage, judgment, or decree, against the portions of any of the heirs, it is equitable that on a claim filed, such liens should be admitted as a valid charge against the shares of the heirs in the surplus. *Ib.*

27. The equity of general-lien creditors, is regulated by the priority existing at the time of the sale. *Ib.*

38. An amendment of a docket of a judgment made after the title of the judgment debtor has been divested in due course of law, does not operate to give a lien on the estate sold under a prior incumbrance. *Ib.*

39. Where a judgment was correctly docketed in every respect, except that the time when it was perfected was entered as of 1842, instead of 1841, *Held*, that the error was not substantial as against a junior judgment creditor claiming priority of lien in consequence of such mistake, upon surplus monies. *Ib.*

#### REVOCATION.

*See* ADMINISTRATOR, 2.

BIRTH OF CHILD, 1, 2.

*Donatio mortis causa*, 3, 4, 5, 6, 7, 8.

WILL, 6, 7, 8, 10.

1. After administration granted, four unattested wills, three others apparently duly executed, and several papers of revocation were discovered. The last of the executed wills was proved, and it was *held* that it was not revoked by any of the other instruments, which were only subscribed by the testator, but not attested by subscribing witnesses. A revocation, to be valid, must be executed with all the formalities requisite for the due execution of a will. The will is not affected by any written evidence of an intention to revoke, no matter how clearly proved or frequently expressed. *Nelson v. Public Administrator*. 210

2. The Revised Statutes permit the revocation of a will by its "destruction" by the testator, and do not require proof of the mode of destruction, when the instru-

ment was last in the testator's possession and cannot be found. *Bulkley v. Redmond*. 281

3. Proof of the "injury or destruction" of the will, by two witnesses, is only required when the act has been performed by some other person, in the testator's presence and by his direction and consent. *Ib.*

4. When the will is last traced to the possession of the testator, and on his decease, after examination of his papers, and proper inquiry of the persons in his confidence and about his person during his last sickness, it cannot be found, the presumption is that it was destroyed by the testator, *animo revocandi*. *Ib.*

5. If a will proved to have been executed, and to have been in the possession of the decedent, cannot be traced to the custody of another, or cannot be found, the presumption of law is, that it has been destroyed *animo revocandi*. *Holland v. Ferris*. 334

6. Whether, at common law, a will of personalty, not disposing of the whole estate, would be revoked by the birth of a child, and an alteration of circumstances—*quære?* *Bloomer v. Bloomer*. 340

7. Whether, at common law, a *donatio causa mortis*, not disposing of the whole estate, would be revoked by the birth of a child—*quære?* *Ib.*

8. The testator directed his executors to take possession of his estate, real and personal, and to pay to M. V. V. the net income to be derived from his store in Cedar Street. The premises in question were sold and conveyed by the testator, in his lifetime, and a bond and mortgage taken

for the consideration money,—  
*Held*, that the devise was re-  
voked by the conveyance. *Bar-*  
*stow v. Goodwin.* 418

SET-OFF.

On an application for leave to  
issue execution upon a judg-  
ment against an executor, for  
costs occasioned in the defence  
of a proceeding instituted by the  
executor, the latter claimed to  
offset a judgment against the ap-  
plicant recovered by C. B., and  
assigned to the executor. *Held*,  
that as the judgment for costs  
was in terms against the execu-  
tor in his representative capa-  
city, and *to be paid out of the*  
*assets of the deceased*, it must  
abide the course of distribution  
of the estate. The judgment  
purchased by the executor be-  
longed to him individually. To  
authorize a set-off, the debts  
must be mutual, and due to and  
from the same persons in the  
same capacity. It is against  
sound policy to permit executors  
to buy up claims against credi-  
tors of the deceased, for the pur-  
pose of obtaining a set-off in  
equity. *Dudley v. Grincolt.* 24

SPECIFIC LEGACY.

*See* BEQUEST, 2.  
REAL ESTATE, 18.

SUBSTITUTION.

*See* WILL, 41.

TAXES AND ASSESSMENTS.

*See* BEQUEST, 3, 11.  
REAL ESTATE, 5.

SURVIVORSHIP.

*See* BEQUEST, 7, 8, 9.

TRUSTEES (ACCOUNTING OF).

*See* ACCOUNTING, 11, 12.

VERBA DE FUTURO.

*See* MARRIAGE, 1, 3.

VESTING OF LEGACIES.

*See* BEQUEST, 7, 8, 9, 10.

WIDOW.

*See* INVENTORY, 1, 2, 3, 4, 5, 6.

WILL.

*See* ACCOUNTING, 3, 4.  
ADMINISTRATOR, 2.  
ADM. WILL ANNEXED, 3.  
APPEAL, 4, 18.  
BEQUEST, *passim*.  
DEVISE, *passim*.  
DISTRIBUTION, 3.  
MARRIED WOMEN, 1, 2, 3.  
REVOCATION, 1, 2, 3, 4, 5,  
6, 7, 8.  
WITNESS, 1, 2, 3.

1. A will contested on the ground  
of incapacity, undue influence,  
and invalid execution—admitted  
to probate. Where the testator  
was of advanced age, his hear-  
ing slightly affected, and his

- sight very seriously impaired, the circumstances attending the execution of his will should be carefully scrutinized for any traces of imposition or artifice. Kind offices and faithful services tend to influence the mind in favor of the party performing them; and care should be taken not to confound the natural action of the human feelings in this respect, with positive dictation and control exercised over the mind of the testator. *Weir v. Fitzgerald.* 42
2. The law does not prohibit deaf, dumb, or blind persons from making a will. Defects of the senses do not incapacitate, if the testator possess sufficient mind to perform a valid testamentary act. *Id.*
  3. The statute does not require a will to be read to the testator in presence of the witnesses, though it is proper to do so when the testator is blind or cannot read. *Id.*
  4. Besides mere formal proof of execution, something more is necessary to establish the validity of a will, when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by the subscribing witnesses, or by evidence *aliunde.* *Id.*
  5. It is not essential that both witnesses should prove that the provisions of the statute, as to the mode of execution, were complied with. Where one witness testified clearly to their performance, and the recollection of the other was vague and indistinct—*Held*, that the proof of execution was sufficient. *Id.*
  6. The probate of a will of personalty, is conclusive as to the validity of the will in every case, except in a proceeding instituted for the purpose of revoking, or modifying the probate. *Campbell v. Logan.* 90
  7. The statute has made no express provision for revoking a probate where another and later will has been discovered: though the power to revoke seems to be implied in the section declaring the force of the probate as evidence, until reversed on appeal, revoked on allegations filed within the year, or "declared void by a competent tribunal." *Id.*
  8. The power to revoke probate has been exercised by the ecclesiastical courts, whether the will was proved in common or in solemn form. The Surrogate may open a decree of probate for the purpose of taking proof of a later will. This power is incidental to his jurisdiction of the proof of wills, and is essential to the administration of justice. *Id.*
  9. The Surrogate's Court proceeds in all matters relating to the probate of wills, and the administration of the estates of deceased persons, according to the course of the common and ecclesiastical law, as modified by statutory regulations. Where jurisdiction is given by statute, the mode of exercising it in cases not specially provided for, must be regulated by the court, in the exercise of a sound discretion, according to circumstances. *Id.*
  10. Although a will has been admitted to probate, a legatee under a later will may propound the latter for probate, and is not con-

- cluded by the probate of the previous will. If the last will revokes the former, the first decree will be recalled. If the two instruments are not entirely inconsistent with each other, the decree may be so modified as to declare that both instruments, taken together, constitute the last will and testament of the deceased. *Ib.*
11. Whether it is a sufficient compliance with the statute regulating the manner of executing wills, for one witness to write the name of the other, or for a witness to attest by mark instead of subscribing his name, *quære?* *Ib.*
12. Where attestation was made, by one witness signing his own name, and holding and guiding the hand of a second witness while the name of the latter was signed,—*Held*, that the execution was valid. *Ib.*
13. The testatrix requested her will to be altered in the presence of the witnesses; it was altered, read aloud, and executed,—*Held*, that there was sufficient evidence of testamentary declaration. *Ib.*
14. If the will has been attested by strangers, evidence of the signature and handwriting of the testator may be resorted to, for the purpose of showing his identity with the party executing the will. *Moury v. Silber.* 133
15. The decedent was seventy-five years old, his mind and memory were impaired, and though he was not legally incompetent to make a will, it was *held* that a testamentary disposition of his property ought not to be sustained, unless proved to have been fairly made,—to have emanated from him of his own free will, without the interposition of others,—and to have accorded with his intentions otherwise expressed, or implied from the state of his family relations. It is not enough in such a case to show that instructions were given by the testator, especially where he was so situated that the instructions may have been procured by undue influence. *Ib.*
16. An unequal will, executed by a person weak in mind and body, at the house of the party most largely benefited,—the execution not communicated to the children of the decedent, and the provisions of the will not being in harmony with his previously expressed intentions and dispositions,—*Held*, that the ordinary presumptions flowing from the act of formal execution did not obtain; that the burden was thrown on the party seeking to establish the testamentary act, of proving that precautions were taken and explanations had to secure to the testator the full and free action of his impaired faculties, and that in such a case the order of proof was reversed, and it should be shown affirmatively that no imposition was practised. Will *rejected*, on the ground that the proof was deficient in not affording such satisfactory evidence as the circumstances demanded. *Ib.*
17. The decedent acknowledged the subscription of his name to the instrument offered for probate,—the document was so covered by a piece of blank paper that no part was visible but the attestation clause, the signature, and a line or two of the will,—the witnesses might have read the attestation clause, but they did not, and were not requested to do so,—both witnesses concurred in stating that the decedent only acknowledged his sig-

nature, and, pointing to the attestation clause, requested them to sign as witnesses, but did not declare the instrument to be his will,—from extraneous circumstances they supposed it to be a will, and one of them expressed that opinion to the decedent, who neither assented to nor denied it,—*Held* that there was not a sufficient testamentary declaration, and that the will must be rejected as invalidly executed. *Ex parte Beers.* 163

18. A declaration is an open act or manifest signification, or assertion or assent by words or signs; and it must be made to appear by unequivocal circumstances, so that the testamentary character of the instrument is shown to have been communicated by the testator to the witnesses. *Ib.*

19. A mutual or conjoint will, executed according to the Danish law, by husband and wife, then resident in a Danish colony, is valid, though not attested according to the laws of New York. Such an instrument may be admitted to probate here, on original proof of the handwriting of the parties, notwithstanding there are no subscribing witnesses. *Ex parte McCormick.* 169

20. The law of the testator's domicile at the time of his decease, governs in respect to his testamentary capacity, so far as relates to moveables. But in regard to the solemnities and forms requisite to the due execution of a will of personalty, if the method of execution conform both to the law of the domicile at the time of execution, and to the law of the place where the act is performed, the will continues valid, though there be a subsequent change of domicile,

and by the laws of the new domicile different form sare required. *Ib.*

21. The testator was a man of intemperate habits, and at times his conduct indicated signs of mental aberration. A will was prepared for him when in a state of insensibility, without any previous direction or knowledge; during a temporary revival to a state of consciousness, its execution was not attempted, but on a relapse, it was engrossed, presented to him and read, and he was asked if it was right, and he answered, Yes. It was then executed, the decedent making affirmative answers to the formal questions put to him touching the testamentary declaration, &c. *Held*, that under the circumstances, and in the absence of any clear and satisfactory proof of instructions and intentions, probate must be denied. *McSorley v. McSorley.* 188

22. The testatrix commenced her will in this way—"According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of H., &c. Of this, I leave to A. L., &c., &c." After making the will, she proceeded safely to St. Louis, and subsequently returned to New York, where she died,—*Held*, that the validity of the instrument must be tested by the proof of its original execution, and by its contents, without the aid of parol evidence as to the intention of the testatrix in respect to its subsequent ratification. Wills may be conditional, that is, dependent for their testamentary operation upon a specified contingency. The condition must appear upon the face of the will, and go to the root of the entire

- instrument, in order to affect the question of probate. *Ex parte Lindsay*. 204
23. If the conditions are of partial application, the will is admitted to proof, and the effect of the conditions upon particular legacies, becomes a matter of construction. If the words do not clearly express that the entire instrument is to take effect or to fail upon a particular event, the court is justified in a sentence of probate on the formal proof, so as to leave the determination of its conditional character for subsequent consideration. *Held*, that the words "according to my present intention," &c., in the introductory part of the present will, may have been designed to express the occasion of making the instrument, rather than a clear condition on which its validity was to depend, and the will was accordingly admitted to proof. *Ib.*
24. Two wills bearing the same date, purporting to be attested by the same witnesses, and both in the handwriting of the decedent—one recognized and proved by both witnesses, who denied any knowledge of the other—the latter was admitted to probate as the *last* will, notwithstanding the denial of the witnesses,—upon evidence of handwriting, identification of the instrument as recognized by the decedent, *memoranda* in the handwriting of the deceased, and other circumstantial evidence. *Peebles v. Case*. 226
25. If the subscribing witnesses have lost all recollection of the execution, the court, if satisfied from other evidence that they did in fact witness the will, may admit it to probate; the performance of the usual formalities being inferred from the recitals of the *testatum* clause. *Ib.*
26. When the subscribing witnesses corruptly deny the execution, and *a fortiori*, when they are mistaken, the proof of the will may be supplied from other sources. *Ib.*
27. The proof of a will abides by the same rules of evidence as prevail in all other judicial investigations. The question for the Court is the *factum* of the instrument, and that may be proved in the very teeth of the subscribing witnesses. As to the effect, nature, and character of their testimony, the subscribing witnesses stand on the same ground as other witnesses, on the subject of contradiction; and if untruth, mistake, or want of recollection be alleged, it is not only competent to prove it, but, on its being proven, and the Judge being satisfied of the validity of the will, decree of probate should follow. *Ib.*
28. The sections of the statute providing that, where the witnesses are dead, insane, out of the State, or incompetent to testify, proof of their signatures may be taken, are only directory, and do not forbid a resort to that class of testimony in other cases, when necessary for the ascertainment of truth. *Ib.*
29. Having attained jurisdiction of the subject matter, the Surrogate, where the course of procedure is not prescribed by statute, must dispose of it according to the established rules of evidence. *Ib.*
30. On allegations filed by the daughter and only next of kin of

the deceased, the evidence of testamentary capacity, and of due execution not being satisfactory, and the will not having been signed by the testatrix and the witnesses at the end, the decree of probate was *revoked*.  
*McGuire v. Kerr.* 244

31. Where, at the time of execution, the decedent was in a state of stupor, though perhaps capable of being aroused so as to perform a sensible action, the proof to establish a rational act should be of the clearest character; and, that failing, probate should be denied. *Id.*

32. The statute requiring the will to be signed at the end by the testatrix and the witnesses, demands that they should all agree as to what the end of the will is; and where the signature of the testatrix purported to be signed in one place; then followed the appointment of executors, to which the names of the witnesses were signed; and then came a further provision, to which the name of the testatrix was again put—the witnesses and the testatrix in no instance coinciding as to where the end of the will was—*Held*, that the will was not validly executed. *Id.*

33. The reading of the will in the presence of the testator and the subscribing witnesses, and its subscription by all the parties in the presence of each other, is ordinarily sufficient evidence of a testamentary declaration, and of a request to the witnesses to attest the instrument. The minds of the parties meet on the essential points through the medium of the reading, and acquiescence or consent to the attestation. No particular form is requisite in these respects, except that the testator shall communicate to the

witnesses, that it is his will, and he desires them to attest it. This can be done by reading and other acts, performed by a third person, provided an intelligent assent on the part of the testator be shown. *Moore v. Moore.* 261

34. The will of a testatrix 87 years of age sustained—there being proof of sufficient legal capacity, and of an intention in favor of the beneficiary expressed at the time of making the will, as well as previously and subsequently thereto. Where there is some evidence of a failure of mental power, consequent on advanced age, it is proper to show that the decedent acted with intelligence, and comprehended the effect of what she was doing at the time of the *factum* of the will, and that the provisions of the instrument were in consonance with her wishes and intentions expressed at other periods. *Id.*

35. Where a will was duly executed by the deceased and left in the possession of his counsel, and, a few months after, the testator sent for it, avowing the purpose of destroying it, and a day or two subsequently stated that he had destroyed it; *Held*, that although the facts raised a presumption that the will had been destroyed by the deceased, it was proper to examine his papers for the purpose of ascertaining whether the instrument had in fact been cancelled. *Bulkley v. Redmond.* 281

36. A lost or destroyed will cannot be proved in the Surrogate's Court; but jurisdiction in such cases belongs to the Supreme Court. *Id.*

37. A will cannot be proved as a lost or destroyed will, unless it is shown to have been in existence at the death of the testator, or to

have been fraudulently (or accidentally) destroyed in his lifetime. *Ib.*

38. Where a will, prepared by the counsel of the decedent, pursuant to her directions, was handed to her by one of the subscribing witnesses, who stated that he came "to witness her signing her will" and the testatrix, having read it, declared it to be her will, signed it, and both witnesses subscribed their names in her presence,—*Held*, that there was sufficient evidence of a request to the witnesses to attest the instrument. *Hutchings v. Cochran.*

295

39. A request to sign as witnesses may be communicated by signs, or may be implied from the acts of the parties. When all the circumstances show the design of the testator to execute his will, his knowledge of the character of the instrument, and the purpose for which the witnesses attend, his signing the instrument, and acknowledging it to be his will, his observing the witnesses sign, and then taking the executed paper into his own possession without objection or comment, sufficiently establish and imply a request to the attesting witnesses to join in the necessary formalities. A will, contested for alleged want of capacity, and for undue influence, admitted to probate.

*Ib.*

40. Where the will contained the following clause, "Upon the death of either of my sons John or George, without lawful issue, the one-fourth part of the devises and bequests made to him in this my will shall go to his wife, if she shall then be living, and the other three-fourths of the same shall be divided, share and share alike, among my surviving chil-

dren and the legal heirs of those who may be deceased;" and the testator's son John died without issue, before the testator, leaving his wife, "then living;" and she survived the testator,—*Held*, that John's widow was entitled to one-fourth of all the devises and bequests made to John. The condition that the widow of John shall "then be living," refers to the time of John's death, and not to the time of distribution. *Goodall v. McLean.*

306

41. A clause of substitution is generally referable to the death of the testator. Where the devise or bequest is to the donee by name, with a gift over in case of death, if the event happen in the testator's life-time the ulterior gift takes effect immediately on the testator's decease.

*Ib.*

42. The will of the decedent having been proven in the county of New York, and letters testamentary issued; on the final accounting of the executrix, it appearing that the testator, at the time of his death, was domiciled in the State of Connecticut,—*Held*, that the law of the domicile governs as to the question of testacy or intestacy, in respect to personal estate; and the proper tribunal of the domicile having adjudged the will revoked by the subsequent birth of a child to the deceased, it was incumbent upon this court to hold the will invalid as a will of personality. *Bloomer v. Bloomer.*

389

43. The invalidity of a will as to personality does not, of necessity, render it invalid as to realty, as real estate is governed by the *lex loci*. The will in question being valid as to real estate in New York, and containing a direction for the sale of the real estate, and the distribution of the proceeds,

- under which direction the lands were sold,—*Held*, that the Surrogate had jurisdiction to order distribution. *Held*, also, that the personalty was distributable, as in case of intestacy, according to the laws of Connecticut; and that the disposition of the proceeds of the realty must be regulated by the laws of New York, which give to a post-testamentary child the same portion as would have descended had the parent died intestate. *Ib.*
44. The whole real and personal estate having, by the terms of the will, been thrown into one fund, applicable to the discharge of the various bequests; and two legatees having, in consequence of the revocation of the will as to the personal estate, been left to the proceeds of the real estate alone for payment,—*Held*, that the other legatees, who were next of kin, should be put to their election to take under the will or against it. *Ib.*
45. The power to make a will relates to the personal capacity and the probate; the right to dispose of certain property relates to the effect of the instrument when proved, and its construction. *Waters v. Cullen.* 354
46. An unequal will made by a decedent who for some time before her death had been subject to attacks of *delirium tremens*, and at the time of making the will was under delusions likely to affect her testamentary provisions—rejected. *Ib.*
47. The testatrix, at the time of making her will was ninety years of age; and the probate was contested on the ground of testamentary incompetency and undue influence. It being shown the decedent was of sound mind; that the will was executed with publicity; that it was in harmony with an instrument made six years before, when her capacity was unquestioned; and likewise consistent with her intentions, often expressed before and after it was executed; that its provisions were reasonable; that when made it was carefully read and explained; and there being no trace of concealment, influence, or deception,—the will was admitted to probate. *Maverick v. Reynolds.* 360
48. Great age alone does not constitute testamentary disqualification; on the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials, are shown to have existed; and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness. *Ib.*
49. A will contested on the ground of testamentary incapacity, admitted to proof. *Meekam v. Bourke.* 385
50. The testamentary declaration is essential to due execution. It must be made at the time, be open and manifest. The testator must declare the instrument to be his will; and it is not sufficient for the witnesses to conjecture the character of the instrument. *Wilson v. Hetterick.* 427
51. The will contained a clause disposing of certain assets according to the terms of a schedule, but was executed without the schedule being annexed,—*Held* that, whether the schedule was annexed or not, the will was validly executed, having been signed at the end of those testamentary provisions which

the decedent intended to incorporate in it. *Thompson v. Quimby.* 449

52. Mere speculative belief does not, of itself, afford a clear test of insanity. A will impeached on the ground of incapacity and undue influence, admitted to probate—there being no sufficient evidence of delusion, fraud, or imposition,—the provisions of the will according with the decedent's intentions otherwise expressed,—and the instrument having been prepared with care and deliberation. *Ib.*

WITNESS (SUBSCRIBING).

See WILL 8, 4, 5, 11, 12, 13, 14, 24, 27, 28, 32, 33, 38, 39, 50, 51.

1. When a subscribing witness made her mark, opposite her name written by the other witness, and she "acknowledged it to be her mark and signature," *Held*, that the mode of attestation was a sufficient compliance with the statute requiring the witness to "sign his name." *Meehan v. Bourke.* 385
2. A witness who has written the

testator's name, at his request, must *write* his own name; but other witnesses may *sign* their names, either by writing or by placing a mark opposite to the name when written by another. *Ib.*

3. Where there has been such a lapse of time between the execution of the will and the examination of the subscribing witnesses, as to justify the inference that their recollection may be imperfect, due celebration of the necessary forms may be presumed, unless there be evidence repugnant to such a presumption. There must be enough in the remote date of the transaction and in the circumstances, to lay the defect of the proof upon the infirmity of the human memory. *Wilson v. Hetterick.* 427
4. Not more than three months intervening between the execution of the will and the probate, and the witnesses agreeing substantially in their statements, and seeming to remember the circumstances with essential accuracy, —*Held* that due execution could not be presumed, and there being no evidence of a testamentary declaration, that the will was not validly executed. *Ib.*

*Ex. R. T. T.*

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